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Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply *only* within the territorial jurisdiction of the United States." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (emphasis added; internal quotation marks omitted). The questions presented are:

1. Whether the D.C. Circuit correctly held, in conflict with decisions of other circuits and of this Court, that the traditional presumption against extraterritoriality is completely irrelevant to determining whether Congress intends a statute to reach the wholly foreign conduct of a foreign corporation, if such foreign conduct is alleged to have had a direct and substantial effect within the United States.

2. Whether the D.C. Circuit, in concluding that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (RICO), regulates petitioner's wholly foreign conduct, improperly (a) ignored the presumption against extraterritoriality and affirmative evidence that Congress never intended RICO to apply extraterritorially; (b) borrowed from federal securities and antitrust cases the ill-suited "effects" test as a measure of RICO's extraterritorial reach; (c) approved a watered-down version of that test that conflicts with the test used by other circuits; and (d) relied on the U.S. "effects" of the U.S. conduct of *other co-defendants* and of the "overall" alleged RICO scheme.

RULE 14.1(B) STATEMENT

In addition to the parties named in the caption, the following entities were parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit and may therefore be considered respondents under this Court's Rule 12.6: Philip Morris USA Inc., Altria Group, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Holdings, Inc., Lorillard Tobacco Company, The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute, Inc. (all co-defendants with petitioner British American Tobacco (Investments) Limited in the district court); and Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network (all intervenors in the court of appeals as well as in the district court).

RULE 29.6 STATEMENT

Petitioner British American Tobacco (Investments) Limited states that the following publicly held parent companies have a ten percent or greater ownership interest in it: British American Tobacco p.l.c.; British American Tobacco (1998) Limited; B.A.T Industries p.l.c.; and British-American Tobacco (Holdings) Limited.

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PETITION FOR A WRIT OF CERTIORARI[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-100a)[2] is reported at 566 F.3d 1095. The opinion of the district court (App. 101a-2181a) is reported at 449 F. Supp. 2d 1.

JURISDICTION

The court of appeals entered judgment on May 22, 2009, and denied rehearing on September 22, 2009. App. 1a, 2182a-85a. On November 10, 2009, the Chief Justice extended the time for filing the petition for certiorari until February 19, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, are set forth at App., *infra*, 1a-7a.

STATEMENT

This lawsuit constitutes the federal government's unprecedented use of civil RICO against an entire in-

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[1] Petitioner British American Tobacco (Investments) Ltd. ("BATCo") joins the petitions for certiorari of Philip Morris U.S.A. Inc., Lorillard Tobacco Co., R.J. Reynolds Tobacco Co., and Altria Group, Inc., and incorporates by reference the questions presented and arguments in those petitions.

[2] Citations to "App." refer to the single, jointly captioned appendix filed by BATCo and other petitioners in support of their respective petitions for certiorari. Citations to "App., *infra*," refer to the appendix bound with this petition.

dustry. The government sought far-reaching equitable remedies to "prevent and restrain" (18 U.S.C. § 1964(a)) a scheme by the U.S. tobacco industry and one foreign corporation, petitioner BATCo, to deceive American consumers about the health risks of smoking. The government maintained, and the D.C. Circuit agreed, that RICO's famously open-ended criminal and civil proscriptions extend far beyond the Nation's borders to regulate BATCo's foreign conduct, even though BATCo was never shown to have marketed cigarettes in the United States or to have caused a single fraudulent statement to be made to American consumers. Further review is needed because the decision below compounds conflicts in the lower courts over the meaning of the presumption against extraterritoriality and RICO's extraterritorial reach.

A. The Government's RICO Claim

In this gargantuan lawsuit, the government contended that, beginning in the early 1950s, defendants Philip Morris USA Inc. (then Philip Morris, Inc.) ("Philip Morris"), R.J. Reynolds American (then R.J. Reynolds Tobacco Company) ("Reynolds"), Brown & Williamson Tobacco Company ("B&W"), Lorillard Tobacco Company ("Lorillard"), and American Tobacco Company ("American") made a concerted effort to manage the public relations and marketing issues arising out of growing evidence of health risks associated with smoking. See App. 8a. Those five U.S. companies jointly created two domestic trade groups – defendants the Tobacco Institute, Inc. ("TI") and the Council for Tobacco Research-USA, Inc. ("CTR") (also known as the Tobacco Industry Research Committee ("TIRC")) – to conduct public relations on their be-

half. App. 9a. According to the government, those U.S. companies and trade groups pursued a joint strategy of "sowing doubt" about the link between smoking and health concerns. *Ibid.* The government claimed that, through these and other actions, the defendants violated civil RICO, 18 U.S.C. § 1962(c) & (d), by conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity (or conspiring to do so).

Included among the defendants – but conspicuously absent from the vast majority of the government's allegations – was petitioner BATCo, a corporation organized under the laws of England and Wales, with its principal place of business in England. See *United States* v. *Philip Morris USA, Inc.*, 321 F. Supp. 2d 82, 84 (D.D.C. 2004). According to the government, although BATCo took no actions in the United States in furtherance of the alleged "enterprise" and its foreign activities did not include any fraudulent statements directed at American consumers, BATCo's conduct in other countries was subject to RICO's proscriptions.[3]

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[3] Until 1979, B&W was a U.S. subsidiary of BATCo. See 321 F. Supp. 2d at 84. From 1979 until 2004, BATCo and B&W were sister corporations with a common parent company (B.A.T Industries p.l.c. until 1998, then BAT p.l.c.). App. 1785a-86a. Effective July 30, 2004, B&W's cigarette and tobacco business was merged with R.J. Reynolds Tobacco Company. Contemporaneously, B&W, now a passive holding company, changed its name to Brown & Williamson Holdings, Inc. ("BWH"), and ceased manufacturing, researching, selling, or marketing cigarettes anywhere in the world. BATCo remains a corporate affiliate of BWH. B.A.T Industries p.l.c. was also named as a defendant, but was dismissed for lack of personal jurisdiction. App. 7a. BATCo is thus the only remaining foreign defendant.

B. The District Court's Decision

1. After a bench trial, the district court entered judgment against the defendants and issued a lengthy opinion. App. 101a-2181a. The court determined that the defendants had engaged in a "scheme to defraud" by which they sought to obtain money from cigarette sales by deceiving "the American public" about the dangers of smoking. App. 1887a-91a. In furtherance of that scheme, the court found, the defendants had maintained a racketeering enterprise and used mailings and wire transmissions in violation of 18 U.S.C. §§ 1341 or 1343. App. 1944a-49a. This, in turn, the court ruled, violated Sections 1962(c) and 1962(d) of RICO. App. 1965a-67a.

In making those determinations, the district court relied heavily on conduct that involved various defendants *but not BATCo*. For example:

- A 1953 meeting among the presidents of Philip Morris, Reynolds, B&W, Lorillard, and American. App. 1924a.
- The coordinated issuance by other defendants of a "Frank Statement to Cigarette Smokers" in 1954, and later public statements in the same vein. App. 1952a.
- Advertisements run in U.S. markets and paid for by Philip Morris, Reynolds, B&W, American, and Lorillard. App. 206a, 475a-78a.
- The joint creation, management, and funding of TI, TI committees, and CTR, as well as publications generated by and studies funded and

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In this case, the government has not pursued a veil-piercing theory with respect to BATCo and B&W or BWH.

published by those groups. App. 210a, 240a-41a, 415a, 417a-18a, 450a-51a, 468a-70a, 1926a-27a.

- Additional activities of the TI Environmental Tobacco Smoke Advisory Committee, App. 298a-99a, and the Center for Indoor Air Research, App. 1928a.

The district court did not find that BATCo participated in any of these activities.[4]

2. Over BATCo's objections, the district court determined that RICO regulated the company's wholly foreign conduct. App. 1930a-33a. The court pointed to the statute's substantive breadth, noting that RICO "is an expansive statute, broadly construed to reach a wide array of activity." App. 1931a. Next, the court stated that RICO "may apply to conduct which occurs outside the United States as long as it has a substantial direct effect on the United States." *Ibid.* For RICO to apply "extraterritorially," the court opined, a defendant's actions "must meet either the 'conduct' test or the 'effects' test" – tests developed in securities and antitrust cases. App. 1932a. To meet

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[4] Only eleven of the 148 predicate acts of wire or mail fraud alleged by the government involved BATCo. See App. 2127a-28a, 2136a, 2143a-49a, 2164a-65a (Nos. 11, 30, 50-51, 53-54, 57, 60, 63, 103, 106). All eleven were unpublished communications made before 1984 – more than 15 years before this lawsuit for prospective relief was initiated – between BATCo in England and its then-U.S. subsidiary/affiliate B&W, which is now a passive holding company. See note 3, *supra*. None of those decades-old communications was directed at U.S. consumers; none described statements or conduct by BATCo in the United States; and all addressed *foreign activities* by BATCo, including research in England and positions the company took or intended to take before the U.K. Parliament and other foreign regulators.

the "conduct" test, the defendant must have engaged in "conduct within the United States [that] directly caused a foreign injury." *Ibid.* To meet the "effects" test, the defendant must have engaged in foreign conduct that had "substantial," "direct and foreseeable result[s]" in the United States. *Ibid.*

Because BATCo's foreign activities plainly did not satisfy the "conduct" test, the district court examined the "effects" test and concluded it was satisfied for two reasons:

> *First*, many of BATCo's *statements and policies* at issue in this case *concerned* U.S. subsidiary/affiliate Brown & Williamson and potential litigation in the United States. *Second, and most importantly*, BATCo's activities and statements furthered the Enterprise's *overall scheme* to defraud, *which had a tremendous impact on the United States*, as demonstrated in the Findings of Fact.

App. 1932a-33a (emphasis added); see also App. 1933a (emphasizing impact "on interstate commerce" of "all Defendants taken together" having "bought and sold literally over one trillion dollars of goods and services in interstate and foreign commerce since 1954").

The district court did not specify which of BATCo's foreign activities or "statements and policies" it had in mind, much less explain why that foreign conduct had "substantial direct effects" in the United States. App. 1931a-32a. Elsewhere in its opinion, however, the court discussed three categories of BATCo's conduct: (1) BATCo participated in international industry groups, which worked toward a common goal with

U.S. industry groups; (2) BATCo communicated and shared its proprietary research with its then-subsidiary, B&W, which in turn elected *not* to share that research with the U.S. Surgeon General; and (3) two foreign affiliates of BATCo (in Canada and Australia) were alleged to have destroyed documents that might have been relevant to subsequent foreign litigation. App. 692a-93a, 1807a-44a. The district court never found, however, that any of those three categories of foreign conduct directly caused any actual – let alone direct and substantial – effects in the United States.

C. The Court of Appeals' Decision

A panel of the D.C. Circuit affirmed in large part, vacated the judgment with regard to TI and CTR, and remanded with directions to dismiss those entities from the suit. App. 1a-100a. It also directed the trial court to clarify and make further factual findings concerning whether BWH was reasonably likely to violate RICO in the future, given its current status as a passive holding company. App. 100a; see note 3, *supra*. Most relevant for present purposes, the court of appeals held that RICO reached BATCo's wholly foreign conduct. App. 59a-62a.

The analysis proceeded in three steps. First, the panel declined to accept BATCo's argument that RICO has *no* extraterritorial reach – an argument that rested on the presumption against extraterritoriality, the absence of evidence that Congress intended RICO to apply extraterritorially, and affirmative evidence to the contrary. In the panel's view, it "need not decide" the question "whether RICO has *true* extraterritorial reach" – which the panel defined as "reach[ing] foreign conduct with *no*

impact on the United States" – because the district court had "found BATCo liable on the theory that its conduct had substantial domestic effects." App. 58a (emphasis added). Because "Congress's regulation of foreign conduct meeting this 'effects' test is *not* an *extraterritorial* assertion of jurisdiction," the panel opined, "the presumption against extraterritoriality does not apply." *Ibid.* (internal quotation marks omitted; emphasis in original).

Second, the panel rejected BATCo's argument that the "effects" test was particularly ill suited to an action for forward-looking relief brought under Section 1964(a) of RICO – especially where, as here, the purported domestic effects had occurred decades before this litigation was begun and the aim of the lawsuit was limited to "prevent[ing] and restrain[ing]" future racketeering activity. App. 60a. The panel rejected that argument as having "nothing to do with the case." App. 58a.

Third, the panel held that the district court had correctly determined that the "effects" test was satisfied. App. 59a-60a. The panel relied on BATCo's foreign activities in (a) conducting proprietary nicotine research in England that BATCo shared with its then-subsidiary, B&W, and (b) participating in various international organizations, as well as on (c) "the tremendous domestic effects of *the fraud scheme generally*." *Ibid.* (emphasis added). With regard to BATCo's involvement in international organizations, the panel stated:

> BATCo, in concert with other Defendants, founded, funded, and actively participated in various international organizations, which Defendants themselves saw as instrumental to their efforts to

> perpetuate what the district court found to be their fraudulent scheme in the United States.

App. 59a-60a. As an "example" of how the "Defendants themselves saw" those international organizations as "instrumental," the panel cited an admission by TI (a U.S. trade group to which BATCo never belonged) as well as TI's praise for a foreign trade organization (INFOTAB) of which BATCo was a member.

According to the D.C. Circuit, these determinations – "together with the findings of the tremendous domestic effects of the fraud scheme generally" – demonstrate "that BATCo's participation had substantial, direct, and foreseeable effects in the United States." App. 60a. The D.C. Circuit faulted BATCo, in contending otherwise, for "demand[ing] * * * a nearly unattainable level of specificity." *Ibid.*

REASONS FOR GRANTING THE PETITION

It is widely recognized that the lower courts "have divided" over "whether RICO applies extraterritorially at all." *Liquidation Comm'n of Banco Intercontinental, S.A.* v. *Renta*, 530 F.3d 1339, 1351 (11th Cir. 2008); see also RAKOFF & GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 3.04A, at 3-32.1 (2008) ("no clear consensus has emerged"); SMITH & REED, CIVIL RICO ¶ 6.03[4], at 6-69 (2007) ("courts are divided over whether RICO has extraterritorial application"). The decision below compounds that confusion, as well as the subsidiary conflict over the scope of any such extraterritoriality.

This case raises important and recurring questions concerning the traditional presumption against extraterritorial application of U.S. statutes and the

degree to which Congress intended the federal racketeering statute to regulate persons or activities beyond the Nation's boundaries. The D.C. Circuit largely eviscerated the long-settled presumption – a vital backdrop against which Congress legislates – and replaced it with what amounts to a presumption *in favor of* extraterritoriality. In the D.C. Circuit's view, courts should assume that Congress intends to reach any and all conduct worldwide, including conduct by foreign corporations and individuals, so long as it can be alleged (but not shown) to have substantial effects within the United States. That breathtaking expansion of the United States' legislative jurisdiction is reason enough to grant the petition.

But there is more. The D.C. Circuit also borrowed the "effects" test – developed by the federal courts under the antitrust and securities laws *as measures of Congress's affirmative intent that those particular statutes have extraterritorial reach* – as benchmarks for Congress's intent behind RICO, a very different statute. In so doing, the D.C. Circuit has contributed to the confusion in the lower courts over the scope (if any) of RICO's extraterritorial reach. Moreover, the D.C. Circuit adopted a variant of the "effects" test that conflicts with the test used by other circuits and is so devoid of meaning that, if permitted to stand, it will accord RICO (and many other federal statutes) virtually worldwide application. These developments should be of great concern to this Court, especially in light of the trend – as this case illustrates all too well – to apply civil RICO broadly to new contexts.

I. The D.C. Circuit's Decision Exacerbates Serious Conflicts And Confusion In The Lower Courts

The decision below deepens conflicts and confusion on three important and recurring issues of federal law: (a) the meaning of the presumption against extraterritoriality; (b) the extraterritorial reach, if any, of RICO; and (c) the meaning and proper judicial administration of the "effects" test. This Court's review is needed to resolve these conflicts and provide much-needed guidance to the lower courts.

A. The Conflict Over The Meaning Of The Presumption Against Extraterritoriality

The D.C. Circuit acknowledged the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial boundaries of the United States." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotation marks omitted) (*Aramco*), *superseded in other respects by* 42 U.S.C. §§ 2000e(f), 12111(4). As this Court has explained, Congress legislates against the backdrop of that traditional presumption against extraterritoriality, which "serves to protect against unintended clashes between our laws and those of other nations." *Aramco*, 499 U.S. at 248. Nevertheless, the D.C. Circuit went on to hold that the presumption was *not even implicated* in this case.

Specifically, the court opined that it "need not decide" the question "whether RICO has *true* extraterritorial reach" because the district court had "found BATCo liable on the theory that its conduct had substantial domestic effects." App. 58a (emphasis

added). That rationale rested on a definition of "true extraterritorial reach" as "reach[ing] foreign conduct with *no* impact on the United States." *Ibid.* Because "Congress's regulation of foreign conduct meeting th[e] 'effects' test is '*not* an *extraterritorial* assertion of jurisdiction,'" the court of appeals reasoned, "the presumption against extraterritoriality *does not apply*." App. 58a (quoting *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (emphasis altered)). The D.C. Circuit also cited *Environmental Defense Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993), which had suggested that the presumption "is generally not applied" in instances "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." App. 58a.

The D.C. Circuit's understanding of "extraterritoriality" (and thus of the scope of the presumption) conflicts with the decisions of other federal courts. For example, in *Subafilms, Ltd.* v. *MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (en banc), the Ninth Circuit, applying the presumption against extraterritoriality, held that the Copyright Act did not apply to foreign conduct *even if* it resulted in "adverse effects" within the United States. *Id.* at 1097. The en banc court specifically rejected *Massey*'s suggestion that the presumption would be rendered inapplicable by domestic effects even where the conduct at issue was entirely foreign. *Id.* at 1096-97; see also *In re Maxwell Communication Corp.*, 170 B.R. 800, 812-13 (S.D.N.Y. 1994) (rejecting the *Massey* exception). The compelling need to avoid clashes between U.S. laws and the laws of other nations, the Ninth Circuit explained, "fully justifies application" of the presumption, "even assuming *arguendo* that

'adverse effects' within the United States" exist. *Subafilms*, 24 F.3d at 1097.

The D.C. Circuit's novel concept of "true extraterritorial reach" is also inconsistent with the ordinary meaning of "extraterritoriality." See BLACK'S LAW DICTIONARY 625 (8th ed. 2004) (defining "extraterritorial" as "[b]eyond the geographic limits of a particular jurisdiction"); *id.* at 869 (defining "extraterritorial jurisdiction" as "[a] court's ability to exercise power beyond its territorial limits"). Consistent with that ordinary meaning, this Court has long treated laws as having extraterritorial reach if they apply to *conduct that occurs in a foreign country*. See *Aramco*, 499 U.S. at 248 (framing extraterritoriality issue as "whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers *outside of the United States*") (emphasis added); *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 173 (1993) (referring to "the presumption that Acts of Congress do not ordinarily apply *outside our borders*") (emphasis added); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 354, 357 (1909) (Holmes, J.) (the "improbability of the United States attempting to make acts *done in Panama or Costa Rica* criminal is obvious") (emphasis added).[5]

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[5] This Court has adhered to Justice Holmes's understanding of what it means for a law to apply extraterritorially, as the cases cited in text demonstrate, although *American Banana*'s precise holding that the Sherman Act has no extraterritorial application was later substantially overruled. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 (1993). Commentators also recognize that understanding. See, *e.g.*, Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV.

The D.C. Circuit's cramped definition of extraterritoriality (and recognition of an easily satisfied exception to the presumption against extraterritoriality) is also squarely at odds with this Court's teaching that the presumption is important and must be given real teeth. See *Aramco*, 499 U.S. at 248; *id.* at 249-51 (making clear that party urging extraterritorial reach of statute has the burden to "make the affirmative showing" of Congress's "clearly expressed" intent required to overcome the presumption). Since *Aramco*, this Court has rigorously enforced the presumption. In *F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), for example, the Court made clear that even if "the more natural reading" of a statute encompasses foreign activity, as long as "the statute's language reasonably permits an interpretation consistent with" the general presumption that Congress seeks to avoid interference with other nations' sovereignty, a court "should adopt" the latter interpretation. *Id.* at 174. See also *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454-55 (2007) (holding that the presumption "tugs strongly against" a statutory construction that would allow extraterritorial application).

Academic commentators have recognized the conflict between the D.C. Circuit's approach and the approach followed by this Court and the Ninth Circuit. Professor William Dodge, for example, has identified alternative meanings that could be ascribed to the presumption. "First," he has explained, "the pre-

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1455, 1456 n.2 (2008) ("A law is extraterritorial when a court applies a domestic law to foreigners for conduct occurring beyond the territorial borders of the nation-state in which the court sits.").

sumption might mean that acts of Congress should apply only to conduct that occurs within the United States, unless a contrary intent appears, regardless of whether that conduct causes effects in the United States" – a view he correctly describes as "the traditional view of the presumption that Justice Holmes articulated in *American Banana*." Dodge, *Understanding The Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 88 (1998). Alternatively, "the presumption might mean that acts of Congress apply to conduct occurring within *or having an effect within* the United States, unless a contrary intent applies" – a view Professor Dodge attributes to Chief Judge Mikva's opinion for the D.C. Circuit in *Massey*. *Ibid.* (emphasis added); see also *id.* at 89, 101 (noting the conflict between the Ninth and D.C. Circuits); Parrish, *supra*, 61 VAND. L. REV. at 1480-81 (noting absence of "consensus * * * among courts and commentators").

Finally, there can be no doubt that the D.C. Circuit's jettisoning of the presumption was important to the outcome in this case. At best the "RICO statute is silent as to any extraterritorial application" (*North South Finance Corp.* v. *Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996); accord *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004); *Alfadda* v. *Fenn*, 935 F.2d 475, 479 (2d Cir. 1991)) – a point the government *never disputed below*. RICO contains no indication that Congress intended it to apply to the foreign conduct of foreign defendants, and it prescribes no standard for determining any extraterritorial reach of RICO liability. Moreover, here as with the statute (Title VII) at issue in *Aramco*, it is telling that "Congress failed to provide any mechanisms for overseas enforcement" of RICO and failed to "ad-

dress[] the subject of conflicts with foreign laws and procedures." 499 U.S. at 256. As the government has elsewhere admitted, "[w]hile the RICO Act authorizes nationwide service of process in civil RICO actions, it *does not authorize service in a foreign country*." U.S. DEPT. OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS 160 (1988) (emphasis added). Accordingly, the government simply cannot "make the affirmative showing" of Congress's "clearly expressed" intent that is required under *Aramco* to overcome the presumption against extraterritoriality. 499 U.S. at 250-51. Thus, the presumption should have been dispositive in BATCo's favor in this case.

Indeed, the D.C. Circuit's evasion of the presumption allowed the panel to ignore strong affirmative evidence in both the statute and legislative history of Congress's intent *not* to apply RICO extraterritorially. For example, the court failed to consider Congress's declared purpose in enacting RICO, which was to "seek the eradication of organized crime *in the United States*." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (emphasis added). Congress made no mention of regulating foreign conduct, and made legislative findings that "*organized crime activities in the United States* weaken the stability of the Nation's economic system" and that "organized crime *in the United States*" had become "widespread." *Id.* at 922-23 (emphasis added); see also *United States* v. *Turkette*, 452 U.S. 576, 588-89 (1981).[6] The D.C. Circuit's flawed ap-

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[6] The legislative history confirms Congress's exclusive focus on "organized crime in the United States." 115 CONG. REC. S5872 (Mar. 11, 1969); see also 115 CONG. REC. S9566-67 (Apr. 18, 1969) (RICO aimed at "stamp[ing] out organized crime in the

proach to the presumption allowed it to ignore these clear markers of Congress's intent (as well as other evidence described below).

B. The Conflict And Confusion Over The Extraterritorial Reach Of RICO

The district court held that RICO does apply extraterritorially simply because RICO "is an expansive statute, broadly construed to reach a wide array of activity" (App. 1931a-32a) – a consideration that provides a compelling reason why RICO should *not* be extended worldwide. With virtually no supporting analysis, the district court proceeded to adopt both the "effects" and "conduct" tests used in the securities and antitrust contexts as the proper measure of RICO's extraterritorial reach. App. 1932a. The D.C. Circuit approved the "effects" test but also held that the statute was *not* being applied extraterritorially *at all* if that test was satisfied.

Other courts have reached different results based on strikingly different rationales. In contrast to the D.C. Circuit's unexplained borrowing of the "effects" test, the Second Circuit has explained that "specifying the test for extraterritorial application of RICO is delicate work" and has strongly suggested that it would be improper to transplant the "effects" and "conduct" tests to the RICO context. *Al-Turki*, 100 F.3d at 1051-52. As the Second Circuit has explained,

> [T]he tests developed in the securities and antitrust cases are premised on congressional intent

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United States"; "organized crime is increasingly taking over organizations in our country").

> in enacting the Securities Exchange Act and the antitrust statutes, not the intention of Congress concerning RICO. We therefore do not assume that congressional intent in enacting RICO justifies a similar approach to the statute's foreign application.

Id. at 1052 (citation omitted); accord *Subafilms*, 24 F.3d 1096 & n.13 (cases involving antitrust and securities laws have turned on "an ascertainment of congressional intent"). The Second Circuit declared it "not at all clear" that the "conduct" test should apply to RICO, since that test's "rationale" – "Congress did not want the United States to become an exporter of fraudulent security instruments" – "does not necessarily" apply to RICO. *Al-Turki*, 100 F.3d at 1052. Compare *Renta*, 530 F.3d at 1352 (among other things, adopting the "conduct" test for the Eleventh Circuit but suggesting that it must be applied "with particular care"). Although the Second Circuit in *Al-Turki* did observe that the "effects" test might be a "more appropriate test" because RICO's civil remedies provision was patterned after the Clayton Act, the Second Circuit had no occasion to decide that "delicate" question since the parties had assumed that the "effects" test applied to RICO and conceded that it could not be satisfied. 100 F.3d at 1052.

Shortly after (and relying heavily on) this Court's decision in *Aramco*, a district court in the Ninth Circuit ruled that RICO does not apply extraterritorially. See *Jose* v. *M/V Fir Grove*, 801 F. Supp. 349 (D. Or. 1991). The case involved foreign seamen working on vessels that sailed from the United States to Japan; the seamen alleged that the vessels' owners violated RICO by making fraudulent misrepresentations

concerning pay scales to them in Japan or in the Philippines. After noting the "effects" and "conduct" tests used in antitrust and securities cases, and carefully analyzing the relevant evidence of Congress's intent, the district court concluded that "the language and legislative history of RICO fail to demonstrate clear Congressional intent to apply the statute[] beyond U.S. boundaries." *Id.* at 357.

Among other reasons, the district court pointed out that "the procedural mechanisms contained within [18 U.S.C. §] 1965" governing service of process "are, on their face, limited to U.S. territory." *Jose*, 801 F. Supp. at 357.[7] The *Jose* court also specifically rejected the rationale adopted by the trial court in this case, explaining that extraterritoriality does not follow from the fact that "RICO has been broadly construed to cover a wide array of *conduct*" within the United States. *Ibid.* (emphasis in original). And, in sharp contrast to the D.C. Circuit panel, the *Jose* court relied heavily on the presumption against extraterritoriality. See *ibid.*[8]

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[7] See 18 U.S.C. § 1965(b) (authorizing service of process only "in any judicial district of the United States"); *id.* § 1965(c) (same for service of subpoenas); *id.* § 1965(d) (same for "[a]ll other process"). The enforcement mechanisms concerning civil investigative demands under RICO are similarly limited. See 18 U.S.C. § 1968(g), (h).

[8] See also *Butte Mining PLC* v. *Smith*, 76 F.3d 287, 291 (9th Cir. 1996) ("We do not suppose that Congress in enacting RICO had the purpose of punishing frauds by aliens abroad even if peripheral preparations were undertaken by them here."); *Castellanos* v. *Pfizer, Inc.*, 2008 WL 2323876, at *2 (S.D. Fla. May 28, 2008) (RICO applies "only to organized crime occurring within the United States or directed at the United States").

In contrast to the D.C. Circuit's decision below, the Ninth Circuit has held (in a case involving the Sherman Act) that the "effects test by itself is incomplete" as a gauge of extraterritorial reach "because it fails to consider other nations' interests" or "the full nature of the relationship between the actors and this country." *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 611-12 (9th Cir. 1977). "An effect on United States commerce," the Ninth Circuit reasoned, "although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness." *Id.* at 613. Instead, courts must consider a number of additional factors bearing on comity and fairness, including "the nationality or allegiance of the parties and the locations of principal places of businesses or corporations," the "potential degree of conflict" with foreign laws and policies "if American authority is asserted," and "the relative importance to the violations charged" of the pertinent foreign conduct. *Id.* at 614-15; accord *Jose*, 801 F. Supp. at 357 (explaining that "the factors employed in *Timberlane*," especially the comity and fairness issues, "weigh against extraterritorial application [of RICO] in this case"). The D.C. Circuit failed to consider any of these factors. Compare *Al-Turki*, 100 F.3d at 1052 (RICO's provision for treble damages "heightens concerns about international comity and foreign enforcement").

Finally, in the absence of a "clear consensus regarding the legal test to use" in this setting, some courts have suggested that RICO might apply extraterritorially to "things in the nature of classic organized crime" (such as drug trafficking), but not to

activities that are far removed from those activities. *Doe I* v. *State of Israel*, 400 F. Supp. 2d 86, 115 (D.D.C. 2005). Thus, in *State of Israel*, which involved RICO claims brought by Palestinians against Israel, Israeli government officials, and settlers in the West Bank, the court held that RICO did not reach the defendants' activities in the West Bank. "Congress intended RICO to apply extraterritorially," the court explained, "but not to cases like this one." *Ibid.* The court distinguished between cases involving "activities like drug-trafficking," which are often conducted by "modern criminal organizations" with "an international infrastructure," and cases that seek to "litigate the political crises of the global community." *Id.* at 115-16 (citing *United States* v. *Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990)). Had the D.C. Circuit limited RICO's extraterritorial reach to "classic organized crime" activities, BATCo would have prevailed.[9]

Thus, there is substantial disagreement and confusion in the lower courts over the extent, if any, of RICO's extraterritorial reach. See also *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 671 (7th Cir. 1998) ("[T]here are significant questions pertaining to the extraterritorial scope of RICO."); *Concern Sojuzneshtrans* v. *Buyanovski*, 80 F. Supp. 2d 273, 277 (D.N.J. 1999) (noting that "no clear standard has

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[9] In concluding that RICO has some extraterritorial reach, the *Noriega* court relied, among other things, on Section 1962(c)'s references to "any person" and "any enterprise," phrases that supposedly are "all-inclusive and do not suggest parochial application." 746 F. Supp. at 1516. But see *Small* v. *United States*, 544 U.S. 385, 387-94 (2005) (phrase "convicted in any court" does not include convictions in foreign courts).

emerged" and bemoaning "the lack of a coherent standard"). Although no federal court of appeals has squarely held that RICO has *no* extraterritorial reach, the four circuits other than the D.C. Circuit that have ruled or suggested that RICO has *some* extraterritorial reach have not been clear about what that reach is. See *Renta*, 530 F.3d at 1351 (11th Cir.); *Al-Turki*, 100 F.3d at 1051-52 (2d Cir.); *Doe I* v. *Unocal Corp.*, 395 F.3d 932, 961-62 (9th Cir. 2002) (*Unocal*); *Aerovias de Mexico, S.A.* v. *De Prevoisin*, 2000 WL 992495 (5th Cir. June 29, 2000) (unpublished). In any event, this Court has not hesitated to grant review to reject a flawed interpretation of an important federal statute that has been unanimously adopted by the circuits that have considered the issue. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *McNally* v. *United States*, 483 U.S. 350, 355-56 (1987).

C. The Conflict Over The Meaning Of The "Effects" Test

Under both securities and antitrust case law, the relevant domestic effects must be not only "substantial" but also the direct and foreseeable result of foreign conduct. See also 15 U.S.C. § 6a(1) (requiring a "direct, substantial, and reasonably foreseeable effect" on domestic commerce in certain antitrust cases). "Remote and indirect effects in the United States" will not suffice. *Al-Turki*, 100 F.3d. at 1051. "An effect cannot be direct where it depends on * * * uncertain intervening developments." *United States* v. *LSL Biotechnologies*, 379 F.3d 672, 681 (9th Cir. 2004) (internal quotation marks omitted); cf. *Hemi Group, LLC* v. *City of New York*, 2010 WL 246151, at *7 (U.S. Jan. 25, 2010) (civil RICO's direct relation-

ship requirement for causation is not met if injury is separated from conduct by intervening acts or actors). Unlike the D.C. Circuit, moreover, other circuits all apply these stringent standards against the backdrop of the presumption *against* extraterritoriality. For that reason, those courts require that "specific facts" demonstrate "substantial effects within the United States" before extraterritorial jurisdiction will be exercised under RICO. See *Unocal*, 395 F.3d at 961-62.

The D.C. Circuit nominally asked whether BATCo's wholly foreign conduct had resulted in "a substantial, direct, and foreseeable effect within the United States." App. 59a (citing *Consol. Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989)). But, in concluding that the test was satisfied, the D.C. Circuit necessarily endorsed a far less rigorous approach. Thus, the panel found sufficient "effects" to justify RICO liability where there were *no* demonstrable U.S. effects directly attributable to BATCo, as would have been required by other circuits.[10]

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[10] The "effects" test actually applied by the D.C. Circuit more closely resembles the formulation developed in an early, influential case involving the Sherman Act, *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (*Alcoa*), under which foreign conduct could be regulated if it was "intended to and actually * * * ha[d] an effect on United States imports or exports which the statute reprehends." *Al-Turki*, 100 F.3d at 1051-52 (citing *Alcoa*). That formulation, however, predated Congress's 1982 amendment of the antitrust laws. See 15 U.S.C. § 6a(1). Many lower courts have continued to apply the more lenient *Alcoa* formulation or its variants, see H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 (describing six different versions of the *Alcoa* "effects" test), in RICO and other cases. See, *e.g.*, *Norex Petroleum Ltd.* v. *Access*

Notably, the district court's lengthy opinion did not include a single factual finding of substantial and foreseeable effects within the United States resulting *directly* from BATCo's foreign activities. In nevertheless affirming that sufficient "effects" had been demonstrated, the D.C. Circuit relied on the following findings: (1) "BATCo conducted sensitive nicotine research for [B&W] abroad and secretly shared the results with [B&W] in the United States," App. 59a; (2) "BATCo, in concert with other Defendants, founded, funded, and actively participated in various international organizations," *ibid.*; (3) TI "admitted that 'the back-wash from events and attacks affecting the industry in smaller countries comes back powerfully to the USA," *id.* at 60a; and (4) TI "praised INFOTAB, an international organization of which BATCo was a founding member, for 'helping the industry to unite in trying to combat the attacks,'" *ibid.* None of those findings establishes that BATCo's foreign activities resulted in direct, substantial, and foreseeable effects. None even refers to activities or statements for which BATCo was directly responsible.

Industries, Inc., 540 F. Supp. 2d 438, 445-49 (S.D.N.Y. 2007) (in RICO case, separately analyzing "securities law version" and "antitrust version" of "effects" test); *Wiwa* v. *Royal Dutch Petroleum Co.*, 2009 WL 928297, at *4-*8 (S.D.N.Y. Mar. 18, 2009) (same); *Nasser* v. *Andersen Worldwide Societe Cooperative*, 2003 WL 22179008, at *3, *6 (S.D.N.Y. Sept. 23, 2003) (same). This practice – along with the Second Circuit's suggestion that the antitrust and securities-law "effects" tests are somewhat different, see *Al-Turki*, 100 F.3d at 1051-52 – has compounded the confusion surrounding that test and spurred calls for "greater guidance" from this Court. *E.g.*, Parrish, *supra*, 16 VAND. L. REV. at 1460-61.

First, with regard to the results of the proprietary research, conducted in England, that BATCo shared with B&W, the panel relied on the district court's finding that, if an intervening actor – B&W – had chosen to share the research results with the U.S. Surgeon General, the Surgeon General's 1964 report "may have" reached different conclusions about the addictive qualities of nicotine. App. 692a-93a. But the district court acknowledged that it was "impossible to say" whether B&W's choice not to share that proprietary research made any difference. *Ibid.* The uncertain possibility that a choice *made by another company* about the handling of BATCo's research *might have had* an impact on American consumers based on how the U.S. Surgeon General *might have interpreted* BATCo's research is a far cry from the requisite "immediate consequence[s]" and "direct effect[s]." See *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992). The supposed U.S. effects of BATCo's nondisclosure of research conducted *in England* were thus "speculative at best and doubtful at worst." *LSL Biotechnologies*, 379 F.3d at 681.

Second, the panel relied on the district court's determination that BATCo had participated in foreign trade associations. But there is no evidence – none – that BATCo's participation resulted in any direct or substantial effects in the United States. Compare *Bowoto* v. *Chevron Corp.*, 481 F. Supp. 2d 1010, 1014-15 (N.D. Cal. 2007) (rejecting extraterritorial RICO claims where plaintiff "failed to present evidence of an 'effect'" in United States). BATCo was not a member of TI or CTR; BATCo's limited participation in international organizations that were *not* defendants in this case involved conduct outside of the United States; and there was no evidence that BATCo took

any steps to market or sell its products in the U.S. or otherwise influence U.S. consumers. Even the district court acknowledged that the foreign trade organizations were geared towards "protect[ing] and enhanc[ing] [members'] market positions *in their respective countries*." App. 300a (emphasis added). Only through third-party activities or other uncertain intervening developments could BATCo's foreign trade-organization memberships have had possible U.S. effects. Such effects do not satisfy the traditional effects test. See *LSL Biotechnologies*, 379 F.3d at 681 ("[a]n effect cannot be 'direct' where it depends on such uncertain intervening developments").

Even more far-fetched was the D.C. Circuit's reliance on the actions and beliefs of BATCo's domestic co-defendants. Statements made by TI – a U.S. trade group with which BATCo was never involved – should count for nothing. The fact that *TI* either believed that the *foreign* effects of foreign conduct may have had "back-wash" effects that reached the United States, or praised in vague, general terms an international group of which BATCo was a member, hardly shows that *BATCo*'s foreign conduct had direct, foreseeable, and substantial U.S. effects. Unlike the D.C. Circuit's example of "when a malefactor in State *A* shoots a victim across the border in State *B*," App. 59a (quoting *Laker Airways*, 731 F.2d at 922), no U.S. effects flow directly from any of BATCo's foreign conduct.

Finally, and most improperly, the D.C. Circuit (like the district court) invoked "the tremendous domestic effects of the fraud scheme generally," that is, the acts of "all Defendants taken together." App. 60a, 1933a. It is precisely this type of generalized and in-

direct effect, not directly attributable to BATCo itself, that is insufficient under a properly circumscribed "effects" test.

Once the district court's improper imputation to BATCo of third parties' conduct is eliminated, not a single finding remains that BATCo engaged in any activity that actually resulted in direct and substantial effects in the United States. On these facts, the "effects" test used in other circuits would not have been satisfied. Thus, the D.C. Circuit strayed from other circuits in relying on "butterfly" and "backwash" effects and on a causal chain so long and attenuated that it would make Mrs. Palsgraf blush. Cf. *Hemi Group*, 2010 WL 246151, at *5-7. The "effects" test as applied by the D.C. Circuit and the district court bears no resemblance to the test used in other circuits.

Here, just as in *Empagran*, this Court should correct a ruling of the D.C. Circuit that improperly extends a federal statute abroad beyond what Congress intended. See 542 U.S. at 159 (reversing D.C. Circuit's assertion of jurisdiction over antitrust claims by foreign plaintiffs alleging foreign injuries merely because domestic plaintiffs had alleged domestic injuries from same scheme). By invoking domestic effects from co-defendants' U.S. actions as a basis for legislative jurisdiction over claims against BATCo (App. 60a), the D.C. Circuit committed the same conceptual error it made in *Empagran*. In both instances, the D.C. Circuit improperly justified its assertion of legislative jurisdiction over extraterritorial claims on the

theory that *other* parties sustained or directly caused domestic injuries (*i.e.*, domestic effects).[11]

II. The Issues Presented Are Important And Recurring

Each of the two related issues presented by this petition arises with great regularity, is highly important, and warrants this Court's review.

A. Whether and to what extent civil RICO applies extraterritorially is of great significance. RICO has been deployed in an increasingly wide array of civil actions since its enactment in 1970. See Warner, *Are The Corporation And Its Employees The Same?: Piercing The Intracorporate Conspiracy Doctrine In A Post-Enron World*, 55 U. KAN. L. REV. 1057, 1063 (2007) ("RICO has been stretched to its maximum breadth"). And, as the cases cited above demonstrate, courts

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[11] Because the circuits are sharply divided over the proper contours of the "conduct" test, this Court recently granted review to examine the extraterritorial reach of the federal securities laws. See *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 783 (2009) (order). This petition presents an excellent opportunity both to clarify the "effects" test and to ensure that the "conduct" test continues to have some independent meaning (because litigants will rarely need to invoke it if the D.C. Circuit's sweeping "effects" test is permitted to stand). At a minimum, the Court should hold this petition pending the decision in *Morrison* because the "conduct" and "effects" tests are "two sides of the same coin" and involve identical inquiries into the directness of the requisite causal link between conduct and effects. *Unocal*, 395 F.3d at 961 ("The 'conduct' test establishes jurisdiction for *domestic conduct* that *directly causes foreign loss or injury*. Conversely, the 'effects' test establishes jurisdiction for *foreign conduct* that *directly causes domestic loss or injury*.") (emphasis in original).

frequently face the question whether to extend RICO extraterritorially.[12]

The D.C. Circuit's new "effects" test would work an unprecedented expansion of RICO. While other circuits continue to limit RICO jurisdiction to cases with truly demonstrable, substantial U.S. effects flowing from a foreign defendant's foreign conduct, the decision below opens the door to lawsuits aimed at foreign conduct by foreign defendants having only the most indirect, speculative, insubstantial, and unproven effects in this country. And, under the logic of the panel's decision, a private plaintiff could state a claim for treble damages under RICO against a foreign defendant simply by joining to the case a co-defendant whose conduct occurred in or had effects in the U.S.

Coupled with RICO's liberal venue provisions, see 18 U.S.C. § 1965(a)-(b), and substantive breadth, the panel's highly attenuated "effects" test could transform D.C. federal courts into a magnet for far-reaching international RICO actions – turning RICO into a global dragnet for extraterritorial activities by foreign actors based on the possibility, however remote, that the "ripples caused by an overseas transaction manage eventually to reach the shores of the United States." *Virtual Countries, Inc.* v. *Republic of S. Afr.*, 300 F.3d 230, 236 (2d Cir. 2002). Congress certainly did not have that in mind when it enacted

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[12] See also SMITH & REED, *supra*, ¶ 6.03[4], at 6-69 to 6-73 (collecting cases); *e.g.*, *Boyd* v. *AWB Ltd.*, 544 F. Supp. 2d 236, 251-53 (S.D.N.Y. 2008); *Government of Dominican Republic* v. *AES Corp.*, 466 F. Supp. 2d 680, 693 (E.D. Va. 2006); *OSRecovery, Inc.* v. *One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 365-68 (S.D.N.Y. 2005).

RICO to combat "organized crime activities in the United States" (Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970)), and "[t]o hold otherwise would be to extend RICO liability [all] over the world." *OSRecovery*, 354 F. Supp. 2d at 367.

B. The ramifications of the D.C. Circuit's new methodology are not limited to the RICO context. Because the "effects" test is used in connection with the antitrust and securities statutes, the extraterritorial reach of those statutes has the potential to be greatly expanded as well. Nor is the "effects" test limited to the antitrust and securities laws; courts have similarly borrowed it to determine the reach of a variety of U.S. statutes. Those other statutes include, for example, the Lanham Act, 15 U.S.C. § 1051 *et seq.*, see *McBee* v. *Delica Co., Ltd.*, 417 F.3d 107, 120-21 (1st Cir. 2005); the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, see *Virtual Countries*, 300 F.3d at 236; and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, see *Dowd* v. *International Longshoremen's Ass'n*, 975 F.2d 779, 791 (11th Cir. 1992).

C. Finally, the D.C. Circuit's flawed definition of "extraterritoriality" – and its recognition of an exception to the presumption against extraterritoriality – have the potential to affect the analysis of legislative jurisdiction in virtually every case. As this case demonstrates, it is easy to allege that foreign conduct causes *some* effect in the United States. Moreover, the D.C. Circuit was quick to uphold a determination by the district court that the effects in this case were substantial and direct even though there was no showing of such effects. The D.C. Circuit simply brushed aside BATCo's insistence on such a showing

(or *any* showing) as a "demand[]" for "a nearly unattainable level of specificity," and it relied instead on the effects of the actions of BATCo's co-defendants. App. 60a. If applied in other cases, this approach would render the presumption against extraterritoriality a dead letter.

Legal scholars have long recognized the risk that the "effects" test could be deployed in a way that "provides no meaningful constraint on the exercise of jurisdiction" and thus "undermine[s] the presumption of territoriality." Parrish, *supra*, 16 VAND. L. REV. at 1474, 1478. That risk has become a reality in this case. This development is especially troubling because of the potentially adverse impact that will be felt by American businesses if other countries reciprocate. See *id.* at 1484-85 ("Americans should be particularly concerned about the democratic legitimacy problems that extraterritorial laws pose now that other countries increasingly seek to apply their laws to Americans."); *id.* at 1488-89 & nn.176-177 (discussing instances of "Europe's recent extraterritorial regulation of Americans"). The watered-down "effects" test used by the D.C. Circuit also exacerbates serious institutional concerns. See *id.* at 1481 ("The 'effects' test has * * * encouraged the judiciary to take on an essentially legislative function by approaching each case on an ad hoc basis.").

III. The Decision Below Is Erroneous

The D.C. Circuit was wrong to conclude that RICO reaches the wholly foreign conduct of BATCo in this case. Each step in the court's analysis was deeply flawed.

A. For reasons explained above (at 11-17), the D.C. Circuit erred in adopting a cramped and incorrect definition of "extraterritoriality" and in creating a novel exception to the presumption against extraterritoriality. A law is "extraterritorial" if applied to conduct that occurs *outside the territorial limits* of the United States. A law does not cease to be applied extraterritorially merely because the foreign conduct it regulates might have effects within the United States. The D.C. Circuit's novel exception to the presumption against extraterritoriality essentially credits the assumption that Congress *always* intends to regulate conduct by foreign entities anywhere in the world as long as such conduct can be alleged (but not shown) to have direct and substantial effects in this country. That assumption is nonsensical and turns the presumption on its head.

B. Had the D.C. Circuit applied the presumption, it would have concluded that RICO does not regulate BATCo's wholly foreign conduct. The presumption is dispositive because, as explained above (at 15-16), there is nothing in the text, structure, or history of RICO to suggest that Congress intended the statute to be applied extraterritorially. Without "the affirmative intention of the Congress clearly expressed," RICO may not be applied extraterritorially. *Aramco*, 499 U.S. at 248. Beyond that, there is ample *affirmative evidence* in the text and legislative history of RICO that Congress did *not* intend the statute to have an extraterritorial reach. See pp. 16-17 & nn.6-7, *supra*.

C. The D.C. Circuit fared no better in its unexplained conclusion that the "effects" test should be transplanted from cases involving the Sherman Act

and securities laws to the very different setting of RICO, a statute whose stated purpose is to target organized crime and racketeering activities *within* the United States. See page 16-17 & n.6, *supra*. Nor does the fact that "the civil action provision of RICO was patterned after the Clayton Act" (*Al-Turki*, 100 F.3d at 1052 (internal quotation marks omitted)) provide any support for borrowing the "effects" test wholesale from antitrust cases. That shows only Congress's desire to arm private and government RICO plaintiffs with some of the same powerful *remedies* to combat racketeering that were available in antitrust cases. It does not show that RICO and the Sherman Act have exactly the same extraterritorial reach.

Moreover, as *Aramco* makes clear, it is the scope of a statute's *substantive provisions* that provides telling evidence of Congress's intent or lack of intent to regulate extraterritorially. See 499 U.S. at 248-56 (examining substantive provisions of Title VII). The Sherman Act's core substantive proscriptions bar contracts, combinations, or conspiracies "in restraint of trade or commerce * * * with foreign nations" as well as attempted or actual monopolization of "any part of the trade or commerce * * * with foreign nations." 15 U.S.C. §§ 1, 2. The federal courts quickly recognized that these market-protecting provisions relating to exports and imports necessarily covered some foreign conduct, because "United States commerce is affected in some degree by every force affecting the world's markets in which we buy or sell, however indirectly." 1B AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 272d, at 279 (2006); *Alcoa*, 148 F.2d at 443 (same).

RICO is quite different. Unlike the securities and antitrust statutes, RICO is not aimed at protecting markets that have unavoidable international dimensions from anticompetitive conduct or fraud. See Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 601 (1990) (explaining that courts "consistently grant extraterritorial relief under 'market statutes,' like the antitrust and securities laws that are primarily intended to protect market interests," but consistently deny it under "nonmarket" statutes such as those relating to employment or the environment). Although RICO includes civil enforcement provisions as well as forfeiture provisions, it is at bottom a criminal statute aimed at punishing racketeering and organized crime. There is nothing comparable in RICO's substantive provisions to the core market-protecting proscriptions of the Sherman Act.[13] Indeed, RICO's predicate acts are all state and federal crimes (and do not include violations of the antitrust laws). See 18 U.S.C. § 1961(1).

D. Finally, for reasons discussed in detail above (at 24-27), the D.C. Circuit was wrong to conclude that the government had carried its burden of demonstrating that BATCo's foreign conduct satisfied the rigorous "effects" test as that test has been traditionally understood and applied by other courts. In fact,

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[13] Moreover, antitrust law is not all of a piece with respect to its extraterritorial reach. The civil remedies provision in RICO (18 U.S.C. § 1964) was patterned after *both* the Clayton Act and the Sherman Act. The substantive provisions of the Clayton Act (relating to price discrimination, tying, exclusive dealing, and mergers) "generally do not reach foreign commerce at all." 1B AREEDA & HOVENKAMP, *supra*, ¶ 272i, at 289.

the government completely failed to show that the foreign conduct of BATCo (as opposed to the U.S. conduct of co-defendants) had *directly* caused any effects in the United States that were both *foreseeable* and *substantial*.[14]

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[14] The district court dealt with the issue of RICO's extraterritoriality in a portion of its opinion holding "that the Enterprise engaged in, and its activities affected, interstate or foreign commerce." App. 1930a-33a. The trial court thus may have erroneously conflated the "effects" test (a measure of Congress's actual intent to regulate extraterritorially under the Sherman Act) with the far more lenient "affecting commerce" standard (a measure of the outer limit of Congress's constitutional authority under the Commerce Clause).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2010

The relevant provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, include the following:

18 U.S.C. § 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-94 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), * * * .

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which

is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final

determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States

for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 U.S.C. § 1968. Civil Investigative Demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

* * *

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(09-5275)

Nos. 09-976, 09-977, 09-979, 09-980 and 09-1012

In the Supreme Court of the United States

PHILIP MORRIS USA INC., FKA PHILIP MORRIS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

R.J. REYNOLDS TOBACCO COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ALTRIA GROUP, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

BRITISH AMERICAN TOBACCO (INVESTMENTS), LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

LORILLARD TOBACCO COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The petitions collectively present the following questions:

1. Whether the court of appeals correctly held that an unincorporated association of corporations and individuals may form an "enterprise" under 18 U.S.C. 1961(4).

2. Whether the court of appeals was required to undertake independent appellate review of the district court's unchallenged findings of fact establishing fraud.

3. Whether the court of appeals correctly held that the First Amendment does not protect petitioners' public statements because they were fraudulent.

4. Whether the court of appeals correctly held that petitioners' statements about "light" and "low tar" cigarettes were false, misleading, and not authorized by the Federal Trade Commission.

5. Whether the court of appeals correctly rejected the argument that any reasonable likelihood of future violations was eliminated by the signing of the Master Settlement Agreement or, alternatively, by the passage of the Family Smoking Prevention and Tobacco Control Act.

6. Whether the court of appeals correctly sustained relief prohibiting specified conduct and requiring corrective statements.

7. Whether the court of appeals correctly concluded that British American Tobacco (Investments) Limited, a foreign corporation, was subject to RICO when it used the interstate mails and wires and engaged in other conduct in the United States in furtherance of a scheme to defraud American consumers, and when it conspired with American companies to pursue that fraudulent scheme.

8. Whether the court of appeals correctly rejected Altria's contention that it did not act with specific intent to defraud.

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In the Supreme Court of the United States

No. 09-976

PHILIP MORRIS USA INC., FKA PHILIP MORRIS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-977

R.J. REYNOLDS TOBACCO COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-979

ALTRIA GROUP, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-980

BRITISH AMERICAN TOBACCO (INVESTMENTS), LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-1012

LORILLARD TOBACCO COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is reported at 566 F.3d 1095. The opinion of the district court (Pet. App. 101a-2181a) is reported at 449 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2009. Petitions for rehearing were denied on September 22, 2009 (Pet. App. 2182a-2815a). On November 10, 2009, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including February 19, 2010, and the petitions were filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, alleging that petitioners engaged in a coordinated scheme to deceive Americans about the addictiveness and health risks of cigarettes, thereby enhancing petitioners' cigarette sales and associated profits. The district court held a nine-month bench trial, admitting nearly 14,000 exhibits and hearing live testimony from 84 witnesses and written testimony from 162 witnesses. Pet. App. 8a. The voluminous evidentiary record includes large numbers of petitioners' internal documents, see, *e.g.*, *id.* at 36a-39a, as well as testimony from numerous former tobacco industry employees and participants that detail petitioners' fraudulent behavior, *e.g.*, *id.* at 35a-36a.

Based on that record, the district court issued a final decision documenting the "overwhelming evidence" that

petitioners conducted and conspired to conduct the affairs of a RICO enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) and (d), by engaging in a decades-long scheme to defraud that petitioners executed in part through their use of mail and wire communications. Pet. App. 103a, 114a-115a, 1887a; see *id.* at 1885a-2004a. The court's opinion, which spans nearly an entire volume of the Federal Supplement, includes more than 4000 enumerated findings of fact and details the affairs of petitioners' enterprise and petitioners' pattern of mail and wire fraud. See *id.* at 119a-1885a.

The district court found, and the court of appeals unanimously affirmed, that the government proved that petitioners participated in the conduct of an enterprise and "knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises." Pet. App. 1888a; *id.* at 5a-6a, 30a. "Put more colloquially, and less legalistically, over the course of more than 50 years, [petitioners] lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as 'replacement smokers,' about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal." *Id.* at 1887a-1888a.

As the court of appeals observed, a summary of petitioners' conduct "cannot adequately present the volumes

of evidence underlying the district court's findings of fact." Pet. App. 37a. "[T]he evidentiary picture must be viewed in its totality in order to fully appreciate how massive the case is against [petitioners], how irresponsible their actions have been, and how heedless they have been of the public welfare and the suffering caused by" their fraudulent conduct. *Id.* at 112a. The following summary thus provides but an outline of the nature and history of the RICO enterprise as found by the district court and affirmed by the D.C. Circuit.

1. In 1953, petitioners' RICO enterprise was established when the presidents of Philip Morris, Reynolds, Brown & Williamson, Lorillard, and American met to develop a joint response to the growing public concern about the health risks of smoking. Pet. App. 122a-127a, 1923a-1925a. The companies, normally rivals in the cigarette market, agreed that no manufacturer would "seek a competitive advantage by inferring to its public that *its* product is less risky than others," *id.* at 124a, and jointly issued a full-page advertisement entitled "A Frank Statement to Cigarette Smokers" that they published in newspapers nationwide on January 4, 1954. *Id.* at 128a-132a. "The Frank Statement set forth the industry's 'open question' position that it would maintain for more than forty years—that cigarette smoking was not a proven cause of lung cancer; that cigarettes were not injurious to health; and that more research on smoking and health issues was needed." *Id.* at 129a.

At its core, petitioners' scheme was designed to "mislead[] consumers in order to maximize [petitioners'] revenues by recruiting new smokers (the majority of whom are under the age of 18), preventing current smokers from quitting, and thereby sustaining the industry." Pet. App. 2011a; see *id.* at 1888a. The goal of the "open

question" strategy, as a senior Philip Morris executive later explained, was to create the impression of scientific uncertainty and thereby "give smokers a psychological crutch and a self-rationale to continue smoking." *Id.* at 417a. The companies declared in the Frank Statement that "[w]e accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business"; asserted that "[w]e believe the products we make are not injurious to health"; and promised to fund objective research into "all phases of tobacco use and health" by scientists "of unimpeachable integrity and national repute." *Id.* at 131a-132a.

Yet at the time the companies issued the "Frank Statement," they already had "documented a large number of known carcinogens contained in cigarette smoke." Pet. App. 396a. Over the ensuing decades, petitioners developed a sophisticated understanding of the toxicity and addictiveness of cigarettes that outpaced that of the public, regulators, and public health authorities. *Id.* at 9a-11a. As the public's knowledge increased, the companies intensified the level of their deceptions. The district court, as the court of appeals explains, catalogued "countless examples of deliberately false statements" by petitioners regarding the health effects of smoking and secondhand smoke, the addictiveness of nicotine and petitioners' manipulation of nicotine delivery to create and sustain addiction, and the claimed health benefits of "light" cigarettes. *Id.* at 45a. The district court found that petitioners' "efforts to deny and distort the scientific evidence of smoking's harms are demonstrated by not only decades of press releases, reports, booklets, newsletters, television and radio appearances, and scientific symposia and publications, but also by evidence of their concerted[] efforts to attack and undermine the

studies in mainstream scientific publications such as the Reports of the Surgeon General." *Id.* at 1894a. In addition, "[a]s their internal documents reveal, [petitioners] engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." *Id.* at 1904a. Petitioners "have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading." *Id.* at 1905a-1906a.

Petitioners executed their scheme to defraud by utilizing an array of jointly created entities, the most visible of which was the Tobacco Institute (TI), which served for four decades as "the leading public voice of [petitioners]." Pet. App. 195a; *id.* at 119a. Petitioners jointly financed TI's operations through payments exceeding $600 million, *id.* at 183a, and their chief executive officers served on TI's Executive Committee, *id.* at 180a, which had the "'final voice on TI matters' and Tobacco Institute statements." *Id.* at 216a (citation omitted). TI "created, issued, and disseminated press releases, public statements, advertisements, brochures, pamphlets, and other written materials on behalf of [petitioners]" that denied "any link between smoking and disease," denied that "nicotine was addictive," denied that "cigarette companies marketed to youth," denied that secondhand smoke "posed a health risk," and "discredit[ed] scientists and public health officials who took a different position on these issues." *Id.* at 196a. As internal TI documents admit: "Our basic position in the cigarette controversy is subject to the charge, and maybe subject to a finding, that we are making false or

misleading statements to promote the sale of cigarettes." *Id.* at 186a.

The Tobacco Institute was but one part of a "network of interlocking organizations" that petitioners created to maintain unity and discipline. Pet. App. 1777a. The Institute's Executive Committee emphasized internally that it was "of prime importance that the industry maintain a united front and that if one or more companies were to conduct themselves as a matter of self interest, particularly in advertising, obvious vulnerability would be the result." *Id.* at 218a (citation omitted). To that end, the International Committee on Smoking Issues (ICOSI) and its successor organizations, the International Tobacco Information Center (INFOTAB) and the Tobacco Documentation Centre (TDC), were established to enable Philip Morris, Reynolds, British American Tobacco (BATCo) and other tobacco companies to "meet discreetly to develop a defensive smoking and health strategy for major markets," including the United States. *Id.* at 1619a (citation omitted); see also *id.* at 320a-335a. BATCo acknowledged internally that "[t]he aim of ICOSI is defensive research aimed at throwing up a smoke screen and to throw doubt on smoking research findings which show smoke causes diseases." *Id.* at 1624a (citation omitted). The members of this group included Philip Morris, Reynolds, Lorillard, BATCo and TI, as well as foreign tobacco companies. *Id.* at 327a-328a.

Petitioners also formed a variety of organizations to create what they termed "marketable science." Pet. App. 1687a. For example, through the Council for Tobacco Research (CTR) and Lawyers' Special Accounts, petitioners jointly financed research programs that were directed by company lawyers and calculated to yield

favorable results. *Id.* at 240a-275a. Petitioners regularly cited the conclusions of the scientists funded through these programs as if they were the objective results of disinterested research, without revealing that the scientists had, in fact, been funded by the industry. *Id.* at 195a.

Petitioners likewise created organizations that appeared to have no connection to the industry, but were in fact designed to generate purportedly independent evidence for use as "ammunition" in manipulating public opinion. Pet. App. 1614a (citation omitted). For example, petitioners created the Center for Indoor Air Research (CIAR) in a manner designed "to 'hide' industry involvement," *id.* at 1652a (citation omitted), and CIAR's influential papers on secondhand smoke failed to disclose the organization's connection to the tobacco industry. *Id.* at 1651a-1653a. Similarly, Indoor Air International (IAI) held itself out as "a 'learned society' dedicated to 'promoting indoor air quality,'" *id.* at 1695a-1696a (citation omitted), while in reality it was funded by Philip Morris and BATCo and run by the law firm of Covington & Burling, *id.* at 1695a-1698a, which served as legal counsel for TI and the industry. *Id.* at 181a, 214a. "All billing was processed through Covington & Burling to avoid any direct connection to the industry." *Id.* at 1695a.[1]

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[1] The district court found that attorneys actively facilitated and "played an absolutely central role" in petitioners' illegal activity "[a]t every stage" by, *inter alia*, "direct[ing] scientists as to what research they should and should not undertake"; "vett[ing] scientific research papers and reports"; "hid[ing] the relationship between [scientific witnesses] and the industry"; "devis[ing] and carr[ying] out document destruction policies"; and taking "shelter behind baseless assertions of the attorney client privilege." Pet. App. 106a.

2. In 2006, after developing an immense trial record, the district court held that petitioners had participated in the conduct of the affairs of an enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. 1962(c) and (d). Pet. App. 1885a, 1995a. The court determined that petitioners' enterprise had the common purpose of preserving and expanding the cigarette market through fraud, *id.* at 1923a-1925a; that it operated through formal and informal organizations, *id.* at 1925a-1928a; and that it has functioned as a continuous unit since 1953, *id.* at 1928a-1930a.

The district court specifically found that petitioners "knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises." Pet. App. 1888a. It explained that, "[i]n the majority of instances, the authors of the fraudulent statements alleged as Racketeering Acts were executives, including high level scientists—CEOs, Vice Presidents, Heads of Research & Development, not entry level employees—at each of the [petitioner] companies who would reasonably be expected to have knowledge of the company's internal research, public positions, and long term strategies." *Id.* at 1984a. The court found it "absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent," explaining that the "Findings of Fact are replete with examples of C.E.O.s, Vice-Presidents, and Directors of Research and Development, as well as [petitioners'] lawyers, making statements which were inconsistent with the internal

knowledge and practice of the corporation itself." *Id.* at 1890a-1891a.

Based on its findings about the profitability of petitioners' participation in the enterprise and the sophistication and resilience of their scheme to defraud, the district court found a reasonable likelihood of future violations. Pet. App. 2007a-2021a. The court accordingly granted injunctive relief enjoining petitioners from committing further acts of racketeering or fraud relating to the marketing of cigarettes, *id.* at 2069a-2070a; from reconstituting specified organizations, *id.* at 2069a; and from making express or implied health claims about cigarettes, including use of descriptors such as "light" or "low tar," *id.* at 2070a-2071a. The court's order requires that petitioners make corrective statements in specified media, *id.* at 2071a-2077a; maintain publicly accessible document depositories, *id.* at 2077a-2084a; and disclose certain marketing data to the government, *id.* at 2084a.

3. Petitioners appealed, challenging the district court's liability ruling and injunctive relief. In their appellate briefs, petitioners made almost no mention of the district court's factual findings and presented no arguments purporting to show that any such findings were erroneous.[2] At oral argument, counsel representing all petitioners (App., *infra*, 1a) represented that, although petitioners did not "agree with the fact findings of the

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[2] The electronic versions of the government's appellate briefs on DVD-ROMs explain the evidentiary record in detail (*e.g.*, Gov't C.A. Br. 5-58) and include an embedded hyperlink for every record citation, enabling the reader to display immediately the relevant page of the record. A similar DVD version of the district court's opinion also includes an embedded hyperlink for each of its numerous record citations. Cf. Order, No. 06-5267 (D.C. Cir. July 28, 2008) (directing clerk to file lodged DVDs).

district court," "we're bringing legal challenges to the court" and "haven't challenged * * * any fact finding." *Id.* at 5a, 7a.

4. In May 2009, the court of appeals unanimously affirmed in part, vacated in part, and remanded. Pet. App. 1a-100a. The court's decision affirmed the district court's liability findings in all significant respects, but remanded for further proceeding on "four discrete issues." *Id.* at 6a, 100a.

The court of appeals rejected petitioners' threshold argument that petitioners could not be liable under RICO for participating in the conduct of the affairs of an "enterprise" because, in petitioners' view, RICO "provides an exclusive list of possible enterprises that covers [only] groups of *individuals* associated in fact, not mixed groups of individuals *and corporations* associated in fact." Pet. App. 18a. The court held that the definition of "enterprise" in 18 U.S.C. 1961(4) is non-exhaustive and includes groups of corporations associated in fact (like petitioners). Pet. App. 18a-20a, 28a. The court reasoned that petitioners' contrary argument was inconsistent both with RICO's text and the uniform decisions of all ten courts of appeals to have addressed the question, and that RICO's broad statutory understanding of "enterprise" ensures that sophisticated racketeers cannot evade liability by employing the corporate form. *Id.* at 18a-29a.

The court of appeals concluded that other purported legal challenges were not properly presented. For example, although the court indicated that it shared petitioners' doubt that a corporation's specific intent to defraud could properly be established by aggregating the knowledge of disparate corporate employees under a theory of "collective intent," it did "not pass on the mer-

its of such a standard * * * because the district court relied on a permissible view of specific intent." Pet. App. 33a, 41a. The court explained that the "overwhelming indirect and circumstantial evidence was sufficient to allow the district court to reasonably infer that the high level executives, including 'CEOs, Vice Presidents, [and] Heads of Research & Development' for [petitioners] knew about their respective companies' 'internal research, public positions, and long term strategies'" and "then made, caused to be made, and approved public statements contrary to this knowledge." *Id.* at 39a (citation omitted).

The court of appeals rejected petitioners' First Amendment defenses, concluding that petitioners' public statements were "clearly and deliberately false" and therefore fell outside the scope of protected speech. Pet. App. 43a-45a. The court explained that it was "not dealing with accidental falsehoods, or sincere attempts to persuade," and that "[petitioners] knew of their falsity at the time and made the statements with the intent to deceive." *Id.* at 45a. The court similarly held that "*Noerr-Pennington* protection" for attempts to persuade the legislature or executive to take particular action "does not apply" because the doctrine does not extend to "deliberately false or misleading" statements and petitioners' racketeering acts were themselves "intended to defraud consumers." *Id.* at 44a, 46a.

The court rejected petitioners' contention that the Federal Trade Commission (FTC) had "blessed their use of labels such as 'light' and 'low tar'" cigarettes, explaining that the argument was foreclosed by this Court's decision in *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538 (2008) (*Altria*). Pet. App. 46a-47a. In addition, the court emphasized that the district court "did not find

liability solely based on the use of descriptors such as 'light' and 'low tar'"; rather, the district court permissibly found that "[petitioners] orchestrated 'highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes,'" despite their knowledge of the falsity of that claim. *Id.* at 47a-48a.

The court further concluded that the Master Settlement Agreement (MSA) executed in separate lawsuits by the tobacco companies and several States did not eliminate the likelihood of petitioners' future violations. Pet. App. 61a-67a. It explained that petitioners "began to evade and at times even violate the MSA's prohibitions almost immediately after signing the agreement" and that petitioners' failure to alter their conduct after the MSA amply warranted the district court's conclusion that future violations were likely. *Id.* at 64a, 67a.

The court rejected challenges to liability that were specific to petitioners Altria and BATCo, Pet. App. 55a-60a, and it rejected most of petitioners' challenges to the district court's injunctive order. The court explained that the injunctions "sufficiently specify the activities enjoined," *id.* at 73a, and that the district court permissibly required that corrective statements appear in the same media that petitioners used "to promulgate false smoking and health messages." *Id.* at 83a.[3]

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[3] The court vacated the finding of liability as to CTR and TI because those entities had been dissolved pursuant to the MSA. Pet. App. 100a. The court also vacated certain minor provisions of the injunction and remanded for reconsideration of those "discrete issues," such as the application of the injunction to petitioners' overseas subsidiaries and clarification of the requirements for point-of-sale displays. *Ibid.* The panel also rejected the government's cross-appeal on remedies. *Id.* at

5. Petitioners filed five separate rehearing petitions, all of which the court of appeals denied without dissent. Pet. App. 2183a.

Meanwhile, petitioners Philip Morris, Reynolds, and Lorillard filed a "Suggestion Of Mootness And Motion For Partial Vacatur," arguing that the June 2009 passage of the Family Smoking Prevention and Tobacco Control Act (FSPTCA), Pub. L. No. 111-31, Div. A, 123 Stat. 1776, had rendered aspects of the injunction moot. The government's opposition explained that the FSPTCA did not render the injunction moot and that any request to modify the injunction in light of the legislation should be directed to the district court in the first instance. Gov't Opp. to Suggestion of Mootness 3-4, 9, 11-12. The court of appeals denied the suggestion of mootness and vacatur motion without opinion.

ARGUMENT

Collectively, petitioners suggest that nearly every aspect of the unanimous decision of the court of appeals presents a significant legal error warranting certiorari. That suggestion is without merit. The D.C. Circuit correctly resolved the only pure question of law the petitioners presented in a ruling that reflects the uniform judgment of all ten courts of appeals to have considered the issue. The remaining legal issues that petitioners now raise are either not properly presented on the record in this case, not subject to any conflict, or otherwise unworthy of review. The petitions should therefore be denied.

92a-99a. The government's petition for a writ of certiorari in No. 09-978 seeks review of the remedial aspect of the court's judgment.

A. An Unincorporated Association Of Corporations And Individuals May Form A RICO Enterprise

Petitioners Philip Morris and Lorillard contend that certiorari is warranted because the court of appeals purportedly erred in holding that a RICO "enterprise" may consist of corporations and individuals associated in fact. 09-976 Pet. (PM Pet.) 24-28; 09-1012 Pet. (Lorillard Pet.) 11-28. In their view, 18 U.S.C. 1961(4) "provides an exclusive list of possible enterprises" and that list includes "groups of *individuals* associated in fact" but "not mixed groups of individuals *and corporations* associated in fact." Pet. App. 18a. That contention lacks merit. RICO's text and the reasoning of *Boyle* v. *United States*, 129 S. Ct. 2237 (2009), demonstrate that RICO provides non-exhaustive examples of an "enterprise" that illustrate, but do not restrict, the ordinary meaning of the term. All ten courts of appeals to have confronted the question have likewise concluded—without as much as a dissenting opinion from even one judge—that corporate entities associated in fact may form a RICO enterprise. No further review is warranted.

1. a. Congress routinely defines statutory terms in one of two ways. Exhaustive statutory definitions—which state precisely what the defined term "means"—establish a self-contained meaning for the term that "excludes any meaning that is not stated." *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) (citation omitted). Terms so defined take their meaning from the definition Congress provides in statute instead of the "term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000). By contrast, non-exhaustive definitions merely state that the defined term "includes" certain enumerated things. In that context, "the term 'includ[es]' is not one of all-embracing definition, but con-

notes simply an illustrative application of the general principle," *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941), that itself builds upon the "ordinary connotation of the [underlying] term." *Groman* v. *Commissioner*, 302 U.S. 82, 88 (1937); *id.* at 85-86; *American Sur. Co.* v. *Marotta*, 287 U.S. 513, 517 (1933) (the term "'include' is frequently, if not generally, used as a word of extension or enlargement" in definitional provisions).

RICO's definitional section, 18 U.S.C. 1961, provides a non-exhaustive definition of "enterprise." Section 1961(4) states that the term "'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4) (emphasis added). As the court of appeals explained, Congress's "use of the word 'includes' indicates that RICO's list of 'enterprises' is non-exhaustive." Pet. App. 25a-26a. The term therefore encompasses groups that fall within the ordinary meaning of "enterprise"—such as "a group of individuals, corporations, or partnerships associated in fact"—even though Section 1961(4) does not "expressly mention[] this type of association." *Id.* at 19a; see *id.* at 21a. The broader context of Section 1961 confirms "the non-exhaustive nature of 'includes'" because Congress chose in that provision to "alternat[e] between the words 'means' and 'includes' to introduce the section's various definitions," thereby "signal[ing] its intent to distinguish between [the] exhaustive and non-exhaustive lists" defining RICO's statutory terms. *Id.* at 26a.

One month after the court of appeals issued its decision, this Court confirmed that Section 1961(4)'s definition of "enterprise" is non-exhaustive. In *Boyle*, this

Court made clear that Section 1961(4)'s "obviously broad" "enumeration of included enterprises" does "not purport to set out an exhaustive definition of the term" and does "not specifically define the outer boundaries of the 'enterprise' concept." 129 S. Ct. at 2243 & n.2. Like the court below, *Boyle* concluded that Congress's disparate use of "means" and "includes" in RICO's definitional section demonstrates that the inclusive definition of "enterprise" retains the "ordinary meaning" of the term and therefore "does not foreclose the possibility that the term might include" other types of enterprises other than the "specifically enumerated" ones. *Id.* at 2243 n.2 (citing the Court's similar interpretation of Section 1961 in *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989)). *Boyle* therefore reasoned that the meaning of "enterprise" reflected in "ordinary usage" informs the meaning of the term in RICO and held, based on that ordinary meaning, that an association in fact of individuals "must have a purpose" to qualify as an "enterprise." *Id.* at 2244.

Boyle's reasoning is fatal to Lorillard's contention (Pet. 14-18) that Section 1961(4) exhaustively describes the entities that may constitute an "enterprise." In resolving the question whether "an association-in-fact enterprise must have an ascertainable structure beyond that inherent in the pattern of racketeering activity," *Boyle*, 129 S. Ct. 2244 (internal quotation marks and citation omitted), the Court expressly held that Section 1961(4) does not provide "an exhaustive definition" of "enterprise" or "define the outer boundaries" of the term. *Id.* at 2243 & n.2. If Lorillard were correct that RICO's text provides a wholly exhaustive definition, then the ordinary meaning of "enterprise" would have been irrelevant and the (purportedly exhaustive) defini-

tional text in Section 1961(4) would have controlled. See *Carhart*, 530 U.S. at 942 (citing cases). The Court instead interpreted "enterprise" based on the "meaning of the term in ordinary usage" as reflected in dictionary definitions precisely because the definitional text was not itself exhaustive. See *Boyle*, 129 S. Ct. at 2244.

The court of appeals' decision also follows from the logic of several decisions of this Court that have repeatedly drawn a distinction between "means" and "includes" when Congress has alternated between those terms to introduce statutory definitions. Those decisions have consistently found that such "disparate inclusion or exclusion" (*Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted)) to reflect an intent to provide a non-exhaustive definition of those terms that Congress has defined to "include" specifically enumerated items. See, *e.g.*, *Boyle*, 129 S. Ct. at 2243 n.2 (construing Section 1961(4)); see also, *e.g.*, *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 & n.15 (1977); *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934); *American Sur. Co.*, 287 U.S. at 517; cf. *H.J. Inc.*, 492 U.S. at 237 (concluding that the definitional use of "require" instead of "mean" in Section 1961(5) reflects that the scope of the defined term is "broad").

Lorillard asserts (Pet. 16) that Section 1961's other definitions beginning with "includes" are "exhaustive" even though it offers argument only for the definition of "Attorney General." Even that definition, however, is not "exhaustive." The enumeration in Section 1961(10) does not, for example, specifically include a person selected by the President to perform temporarily "the functions and duties" of the Attorney General, 5 U.S.C. 3345(a)(2) and (3), or an independent counsel that could have been appointed by a court to prosecute RICO viola-

tions, 28 U.S.C. 593(b), 599 (expired 1999), neither of whom are "designated by the Attorney General" under the definition. See 18 U.S.C. 1961(10); cf. *Authority of the President to Name an Acting Attorney General*, 31 Op. Off. Legal Counsel ___ (2007), http://www.justice.gov/olc/2007/authority-of-the-president-name-ag-070908.pdf. Lorillard makes no attempt to demonstrate that any other definition in Section 1961 that begins with "includes" is exhaustive, but simply quotes (Pet. 16) the definition of "person" and "documentary material" without elaboration.

Based on Congress's direction in RICO that courts may issue appropriate orders, "including, but not limited to," three categories of orders, 18 U.S.C. 1964(a), Lorillard also contends (Pet. 16-17) that Congress used the term "includes" differently in Section 1961 because Congress omitted the phrase "but not limited to." But that supplementary language in Section 1964(a)—which is not a definitional section—simply emphasizes the breadth of the appropriate remedial orders that it authorizes. Section 1961 had no need for such emphasis because it employs "includes" in a significantly different context: the juxtaposition of "means" and "includes" in that section itself makes clear that the inclusive definitions are non-exhaustive. See Pet. App. 27a.

Lorillard's reliance (Pet. 17) on *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009), is also misplaced. Although *Carcieri* interpreted a single, free-standing provision defining "Indian" to "include" certain categories of Indians as comprehensively defining the term, 25 U.S.C. 479, it did so because other statutory provisions specifically showed that Congress recognized that the definition did not "encompass tribes other than those" in the statutory enumeration. 129 S. Ct. at 1066. And, unlike RICO, the

definition in *Carcieri* does not disparately employ "means" and "includes" to define different statutory terms, reflecting Congress's intent to enact exhaustive and non-exhaustive definitions.

b. Because the ordinary meaning of "enterprise" is not restricted by Section 1961(4)'s non-exhaustive "enumeration of included enterprises," *Boyle*, 129 S. Ct. at 2243 & n.2, Lorillard's heavy emphasis on that enumeration is misplaced. As *Boyle* explains, the ordinary meaning of "enterprise" encompasses "a 'venture,' 'undertaking,' or 'project.'" *Id.* at 2244 (citation omitted). And Lorillard's own arguments show that "a group of corporations associated in fact" constitute, in common parlance, just such a "joint venture[]." See Lorillard Pet. 26. So long as a joint venture by corporate entities reflects a common "purpose," embodies "relationships among those associated with the enterprise," and has "longevity sufficient to permit those associates to pursue the enterprise's purpose," *Boyle*, 129 S. Ct. at 2244, it qualifies as an "enterprise" under RICO.

Philip Morris resists the conclusion that the "ordinary meaning" of enterprise can include a group of corporate entities, asserting that "a group of unaffiliated corporations informally cooperating in an effort to influence government policy" would not be thought of as an "enterprise." PM Pet. 26-27. But that assertion (which reflects a factual premise far removed from this case) cannot be squared with this Court's explanation that "an association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Boyle*, 129 S. Ct. at 2245. Even an "'informal' group" without much "structure" can constitute an enterprise if its members coordinate their actions to pursue a common objective. *Ibid.*

c. Petitioners' restrictive interpretation of Section 1961(4) disregards this Court's repeated admonition that "RICO is to be read broadly." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497 (1985); accord *Boyle*, 129 S. Ct. at 2243 (citing cases). Congress followed a "pattern * * * utilizing terms and concepts of breadth" in RICO, including in the statute's inclusive definition of "enterprise." *Russello*, 464 U.S. at 21; see also *NOW* v. *Scheidler*, 510 U.S. 249, 257 (1994) ("RICO broadly defines 'enterprise'"); *United States* v. *Turkette*, 452 U.S. 576, 580-581, 583 (1981) (construing "enterprise"). If there were any doubt on that score, Congress's express statutory direction that RICO be "liberally construed to effectuate its remedial purposes" confirms the "expansive" scope of its "concept of an association in fact." *Boyle*, 129 S. Ct. at 2243 (quoting RICO, Pub. L. No. 91-452, § 904(a), 84 Stat. 947); see also S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) ("enterprise" is defined "to include associations in fact, as well as legally recognized associative entities," and that "infiltration of any associative group by any individual or group capable of holding a property interest can be reached"); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56 (1970) (same).

The broad scope of the enterprise concept reflects RICO's origins. "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima*, 473 U.S. at 498. And, while Congress undoubtedly intended the statute to be used to combat organized crime, "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc.*, 492 U.S. at 248; accord *NOW*, 510 U.S. at 260. RICO accordingly targets criminal associations that "extend well be-

yond[] those traditionally grouped under the phrase 'organized crime'" in order to target "a wide range of criminal activity, taking many different forms" and involving "a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. at 243, 248-249.

Congress's decision to provide a broad, non-exhaustive definition of "enterprise" capturing the full range of associational forms that might be employed by sophisticated criminals is consistent with its intent that RICO be "a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless." *United States* v. *Perholtz*, 842 F.2d 343, 353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) (rejecting petitioners' interpretation of "enterprise" for its "bizarre result[s]"). As the D.C. Circuit explained, an association of individuals and legal entities that exhibits common purpose, organization, and continuity is plainly among "the kinds of entities Congress had in mind." Pet. App. 28a (emphasis omitted) (citing *Turkette*, 452 U.S. at 583). Congress had no reason to doubt that corporations, labor unions, partnerships, or other legal entities would be capable of entering into the sort of dangerous *de facto* alliances that characterize RICO enterprises. See *id.* at 24a (explaining that, on petitioners' theory, "racketeers who would otherwise constitute an association-in-fact might evade RICO's grasp by virtue of their ability to operate through corporations and establish complex networks of companies, kickbacks, and contracts to achieve their elicit ends"). As the Seventh Circuit observed:

> Surely if three individuals can constitute a RICO enterprise, as no one doubts, then the larger association that consists of them plus entities that they control can be a RICO enterprise too. Otherwise while three criminal gangs would each be a RICO enter-

> prise, a loose-knit merger of the three, in which each retained its separate identity, would not be, because it would not be an association of individuals. That would make no sense.

United States v. *Masters*, 924 F.2d 1362, 1366 (7th Cir.), cert. denied, 500 U.S. 919, and 502 U.S. 823 (1991); *United States* v. *Huber*, 603 F.2d 387, 393-394 (2d Cir. 1979) (petitioners' reading would "perversely insulate the most sophisticated racketeering combinations from RICO's sanctions"), cert. denied 445 U.S. 927 (1980); see also *McCullough* v. *Suter*, 757 F.2d 142, 143-144 (7th Cir. 1985) ("[W]e cannot believe that Congress would have wanted gangsters to be able to escape the clutches of section 1962(c) just by avoiding the corporate form.").

d. Lorillard contends that vagueness concerns, practical considerations, and the rule of lenity, should "resolv[e any] ambiguity" in Section 1961(4) by limiting enterprises to those expressly listed. Lorillard Pet. 20; *id.* at 20-25. But Section 1961(4) is an inclusive, not exclusive, definition whose text employs capacious, not ambiguous terms. Congress specifically directed that RICO's terms be "liberally," not narrowly, construed to effectuate the statute's remedial goals, *Boyle*, 129 S. Ct. at 2243, and this Court has declined repeated requests to narrow the scope of RICO's "enterprise" concept with restrictions that themselves are not found in the statutory text. See, *e.g.*, *id.* at 2245-2246 (declining to impose limits that are not "fairly inferred from the language of the statute"); *NOW*, 510 U.S. at 260-261 (refusing to adopt economic-motive limitation); *Turkette*, 452 U.S. at 580-581 (declining to limit "enterprise" to legitimate associations because RICO imposes "no restriction upon the associations embraced" by the term and because Congress could have, but did not, "narrow[] the sweep of

the definition by inserting" additional text). The Court has repeatedly rejected similar appeals to narrow RICO's provisions based on the rule of lenity. *Boyle*, 129 S. Ct. at 2246-2247; see also *NOW*, 510 U.S. at 262; *Sedima*, 473 U.S. at 492; *Turkette*, 452 U.S. at 588 n.10; *Russello*, 464 U.S. at 29.

e. Petitioners' remaining contentions largely reflect policy arguments of the kind this Court has rejected "in favor of the clear but expansive text of the statute," *Boyle*, 129 S. Ct. 2246-2247 (collecting cases). Lorillard asserts that the "purpose of RICO" is to protect corporations from being "victimized by organized crime," not "to combat corporations engaged in joint criminal activity." Lorillard Pet. 18-19 (emphases omitted). But as the court of appeals explained, there is no dispute that corporations can be RICO *defendants* under the statute's plain terms. Pet. App. 21a (discussing 18 U.S.C. 1961(3), 1962(c)). Indeed, this Court has emphasized that "[RICO's] use 'against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.'" *H.J. Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 499). Quite the contrary, the "ability to use RICO against businesses engaged in a pattern of criminal acts" is a result that itself is "inherent in the statute as written." *Ibid.* (quoting *Sedima*, *supra*); see also *Sedima*, 473 U.S. at 499 (explaining that the fact that plaintiffs have brought "fraud cases * * * against" nominally legitimate businesses under RICO "does not demonstrate ambiguity" in the statute, "[i]t demonstrates breadth") (citation omitted).

2. Petitioners ultimately provide no sound reason for this Court to revisit RICO's definition of "enter-

prise" so soon after *Boyle* addressed the term's meaning. Petitioners concede that their interpretation of Section 1961(4) finds no support in the "uniform" decisions of the courts of appeals, Lorillard Pet. 12, 27, which all agree "with the D.C. Circuit's conclusion that a group of corporations can constitute an 'associated in fact' RICO enterprise." PM Pet. 27.[4] Indeed, all ten courts of appeals to have considered the question have held that legal entities like corporations that are associated in fact may form or be part of a RICO enterprise. See *United States* v. *London*, 66 F.3d 1227, 1243-1244 (1st Cir. 1995) (corporation and a sole proprietorship), cert. denied, 517 U.S. 1155 (1996); *Huber*, 603 F.2d at 393-394 (2d Cir.) (corporations and individuals); *United States* v. *Aimone*, 715 F.2d 822, 828 (3d Cir. 1983) (individuals and a corporation), cert. denied, 468 U.S. 1217 (1984); *United States* v. *Thevis*, 665 F.2d 616, 625-626 (5th Cir. 1982) (individuals and corporations), cert. denied, 456 U.S. 1008, 458 U.S. 1109, and 459 U.S. 825 (1982); *Dana Corp.* v. *Blue Cross & Blue Shield Mut.*, 900 F.2d 882, 887 (6th Cir. 1990) (group of corporations); *Masters*, 924 F.2d at 1366 (7th Cir.) (law firm, two police departments, and three individuals); *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886 F.2d 986, 995 & n.7 (8th Cir. 1989) (five legal entities); *United States* v. *Feldman*, 853 F.2d 648, 655-656 (9th Cir. 1988) (individuals and corporations), cert. denied, 489 U.S. 1030 (1989); *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (group of corporations), cert. denied, 475 U.S. 1016 (1986); *Perholtz*, 842 F.2d at 352-354 (D.C. Cir.) (group of indi-

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[4] Lorillard suggests (Pet. 27) that review is warranted to resolve whether a corporation and its employees can constitute an association-in-fact enterprise. That issue is not presented by the facts of this case and was not addressed by the court of appeals.

viduals, corporations, and partnerships). Those courts have reached that unanimous conclusion without even one judge in dissent. Pet. App. 19a-20a (citing cases). In many other cases—including in an eleventh court of appeals—the courts have similarly upheld RICO claims involving association-in-fact enterprises with members including corporations. *Id.* at 20a-21a.[5] Congress, in turn, has repeatedly amended RICO's definitional section against the background of that strikingly uniform appellate authority without adjusting RICO's definition of "enterprise."[6]

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[5] See, *e.g.*, *United States* v. *Najjar*, 300 F.3d 466, 484-485 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); see also, *e.g.*, *Odom* v. *Microsoft Corp.*, 486 F.3d 541, 547-553 (9th Cir.) (en banc), cert. denied, 552 U.S. 985 (2007); *Living Designs, Inc.* v. *E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005), cert. denied, 547 U.S. 1192 (2006); *United States* v. *Cianci*, 378 F.3d 71, 79-85 (1st Cir. 2004); *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275-1277 & n.6 (11th Cir.), cert. denied, 531 U.S. 1015 (2000); *United States* v. *Parise*, 159 F.3d 790, 794-795 (3d Cir. 1998); *United States* v. *Console*, 13 F.3d 641, 652 (3d Cir. 1993), cert. denied, 511 U.S. 1076, and 513 U.S. 1012 (1994); *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *United States* v. *Butler*, 954 F.2d 114, 120 (2d Cir. 1992); *United States* v. *Stolfi*, 889 F.2d 378, 379-380 (2d Cir. 1989); *Ocean Energy II, Inc.* v. *Alexander & Alexander, Inc.*, 868 F.2d 740, 748-749 (5th Cir. 1989); *Bunker Ramo Corp.* v. *United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983); *United States* v. *Campanale*, 518 F.2d 352, 357 n.11 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

[6] See, *e.g.*, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 968, 103 Stat. 506 (adding bank fraud as a predicate act); Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 3, 110 Stat. 1386 (adding criminal infringement of copyright and trafficking in counterfeit labels for computer programs, movies, and music); Weapons of Mass Destruction Prohibition Improvement Act of 2004, Pub. L. No. 108-458, § 6802(e), 118 Stat. 3767 (adding offenses relating to biological, chemical and nuclear materials).

Petitioners' reliance on the oral argument transcript in *Mohawk Industries, Inc.* v. *Williams*, No. 05-465 (argued Apr. 26, 2006), see, *e.g.*, Lorillard Pet. 11-12, 16-17, simply underscores the absence of authority for their position.[7] The *Mohawk* petitioner argued that corporations cannot be members of an association-in-fact enterprise, even though its petition for a writ of certiorari did not separately raise the issue. At oral argument, Justice Scalia noted that the Court would have been "unlikely to accept cert[iorari]" on that issue if it had been raised, given the unanimous holdings of the courts of appeals. 05-465 Tr. at 6. This Court ultimately dismissed the writ in *Mohawk* as improvidently granted, 547 U.S. 516 (2006), and denied a subsequent petition that expressly presented the question. See *Microsoft Corp.* v. *Odom*, 552 U.S. 985 (2007); Pet. at i, 18-19, *Microsoft*, *supra* (No. 07-138); Br. in Opp. at 2, 11-14, *Microsoft*, *supra*. There is no reason for a different result here.

B. The Court Of Appeals Was Not Required To Undertake Independent Appellate Review Of The District Court's Unchallenged Findings Of Fact Establishing Fraud

Although petitioners expressly disclaimed any challenge to the district court's factual findings on appeal, they now contend that the court of appeals was nonetheless required to undertake "independent appellate review" of the more than 4000 findings of fact made by the

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[7] When the Court decided *Boyle*, it presumably was familiar with the oral argument in *Mohawk*. The petitioner repeatedly cited to the *Mohawk* argument transcript, Pet. Br. at 48 n.37, 53 n.42, *Boyle*, *supra*; Reply Br. at 12-13, *Boyle*, *supra*; and his amici specifically argued that corporations could not constitute an association-in-fact enterprise because Section 1961(4) employs the term "includes" to set out an "exhaustive" list of entities constituting a RICO "enterprise." See Chamber of Commerce Amici Br. at 32-33 & n.5, *Boyle*, *supra*.

district court. See PM Pet. 13-23 (citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)); see also 09-977 Pet. (RJR Pet.) 29; Lorillard Pet. 28-29. The question of the proper standard of review for a party's challenge to factual determinations is not presented when the party makes no such challenges. Moreover, no court has adopted petitioners' view that every factual determination in a fraud case must be subjected to *de novo* review on appeal. Finally, petitioners do not explain how independent review would have made a difference to the outcome here, given the "overwhelming evidence" establishing their fraud. Pet. App. 103a.

1. In *Bose*, the Court held that the "ultimate fact" of "actual malice" in a defamation case is not an ordinary factual finding reviewed only for clear error under Fed. R. Civ. P. 52(a). 466 U.S. at 498 n.15, 499-500. The standard of review for such ultimate facts, the Court explained, "must be faithful to both Rule 52(a) and the rule of independent review applied in *New York Times Co.* v. *Sullivan*, [376 U.S. 254 (1964)]," which held that courts in defamation actions must review the record as a whole to ensure that the judgment does not interfere with free expression. *Bose*, 466 U.S. at 499. The Court emphasized, however, that even in such a case, an appellate court's review of the record must give "'due regard' * * * to the trial judge's opportunity to observe the demeanor of the witnesses," *id.* at 499-500 (quoting Fed. R. Civ. P. 52(a)), and must afford "special deference" to the "trial judge's credibility determinations," *ibid.*

2. Petitioners argue that *Bose* required the court of appeals to review *de novo* the district court's factual findings. *E.g.*, PM Pet. 13-23. Unlike the defendant in *Bose*, however, petitioners did not challenge any of the district court's factual findings as unsupported by the

evidence. Instead, they made a strategic decision to raise only legal claims before the court of appeals. Thus, their joint appellate brief assured the court of appeals that it "need not delve into the district court's lengthy fact-finding." C.A. Joint Br. 22. At oral argument, defense counsel reiterated that petitioners "haven't challenged * * * any fact finding." App., *infra*, 5a (Mr. Estrada). He explained that although petitioners did not "agree with the fact findings of the district court," "we're bringing legal challenges to the court." *Id.* at 7a. It is thus entirely unsurprising that the court of appeals did not discuss the applicability of *Bose* and repeatedly noted that the key factual findings underlying the district court's judgment were unchallenged by petitioners. See, *e.g.*; Pet. App. 53a ("[Petitioners] never challenge the district court's findings documenting the impact of nicotine on the body and, more importantly, [petitioners'] understanding of its effects."); *id.* at 52a (citing the "unchallenged findings" that petitioners acted with "fraudulent intent" in denying the risks of second-hand smoke).[8]

Petitioners cannot credibly challenge the standard of review applied to a claim they did not make. This case would accordingly present a poor vehicle for deciding the relevance of *Bose* to factual findings in a fraud case.

3. Even if petitioners had challenged the district court's factual findings below, there would be no basis for review of their *Bose* claim. Although this Court suggested that an appellate court "could" review a fraud finding independently "[a]s an additional safeguard,"

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[8] Petitioners' opening and reply briefs cited *Bose* in the standard of review sections, see C.A. Joint Br. 20-21 & C.A. Joint Reply Br. 6, but only once elsewhere, and that lone citation was not in connection with a challenge to a factual finding, see C.A. Joint Br. 112-113.

Illinois ex rel. Madigan v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 621 (2003) (*Madigan*), the Court did not suggest that such review is required. In fact, the Fourth Circuit expressly rejected the argument that independent review is required in a fraud case. See *SEC* v. *Pirate Investor LLC*, 580 F.3d 233, 242 (4th Cir. 2009), petition for cert. pending, No. 09-1176 (filed Mar. 26, 2010). Petitioners fail to identify any case in which a court has applied *Bose* in reviewing a finding of fraud under the mail or wire fraud statutes.

The few cases petitioners cite (PM Pet. 14-17) do not involve intentional fraud, but rather constitutional review of broad restrictions on commercial advertising alleged to be potentially misleading. *Ibanez* v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), found the Florida Board of Public Accountancy's reprimand of an attorney for (truthfully) including her designation as a certified public accountant on her letterhead to violate the First Amendment. *Id.* at 144. In doing so it did not cite *Bose* or discuss the standard of review.[9]

Similarly, *Peel* v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), found a prophylactic rule prohibiting attorneys from accurately listing specialization credentials in their advertisements to violate the First Amendment. In that setting, the Court was reviewing whether the overall character of the advertising placed it beyond the protections of the First Amendment, see *id.* at 108, not findings of historical fact such as those in a fraud action. As this Court has ex-

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[9] Moreover, it is clear that the Court would have reached the same determination under any standard of review—the Board's argument that the letterhead was misleading was "entirely insubstantial." *Ibanez*, 512 U.S. at 143.

plained, there is a critical constitutional difference between such a "'broad prophylactic rule'" categorically limiting speech and "a properly tailored fraud action targeting fraudulent representations themselves." *Madigan*, 538 U.S. at 619 (alterations omitted); see *Kraft, Inc.* v. *FTC*, 970 F.2d 311, 317-318 (7th Cir. 1992) ("In *Peel*, the issue was whether a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech, passed constitutional muster. * * * Here, by contrast, the issue is whether an individualized FTC cease and desist order, prohibiting a particular set of deceptive ads, passes constitutional muster. * * * Accordingly, we decline to review *de novo* the FTC's findings."), cert. denied, 507 U.S. 909 (1993).[10]

The concerns animating the holding in *Bose* (and subsequent cases assessing claims that certain categories of professional advertising are potentially misleading) do not apply to the factual findings in a fraud case. "The meaning of terms such as 'actual malice'—and, more particularly, 'reckless disregard'— * * * is not readily captured in 'one infallible' definition," and "only through

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[10] *Byrum* v. *Landreth*, 566 F.3d 442 (5th Cir. 2009), likewise involved a constitutional challenge to a state prophylactic rule that "prohibit[ed] significant truthful speech" in interior designers' advertisements. *Id.* at 448; see PM Pet. 16. By contrast, when a case-specific finding of truth or falsity based on assessment of witness credibility is at issue, the Fifth Circuit reviews only for clear error. See *Levine* v. *CMP Publ'ns, Inc.*, 738 F.2d 660, 672 & n.19 (1984) ("Even the *Bose* court recognized that it is important for the reviewing court to respect such choices made by the finder of fact."). *Revo* v. *Disciplinary Bd. of the Sup. Ct.*, 106 F.3d 929 (10th Cir.), cert. denied, 521 U.S. 1121 (1997), and *Falanga* v. *State Bar*, 150 F.3d 1333 (11th Cir. 1998), cert. denied, 526 U.S. 1087 (1999), see PM Pet. 16, also involved challenges to prophylactic rules on attorney advertising.

the course of case-by-case adjudication can [appellate courts] give content to these otherwise elusive constitutional standards." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 686 (1989). The Court has explained that in the libel setting, it therefore has been "reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). By contrast, the elements of fraud, such as falsity and specific intent to deceive, are not "elusive." *Harte-Hanks Communications, Inc.*, 491 U.S. at 686. They are well-established legal concepts that can be readily applied by fact-finders without a need for *de novo* exposition by appellate courts in every single fraud appeal. See *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538, 545 (2008) ("[F]raud claims 'rely only on a single, uniform standard: falsity.'") (citation omitted); *Cherichel* v. *Holder*, 591 F.3d 1002, 1012 (8th Cir. 2010) ("Specific intent is a term of art in American jurisprudence, well known to practitioners and law students alike."), petition for cert. pending, No. 09-1235 (filed Apr. 12, 2010); *United States* v. *Sawyer*, 239 F.3d 31, 40 n.7 (1st Cir. 2001) (same).

4. Finally, petitioners' assertion that "independent appellate review would likely have altered the outcome of th[is] case" (PM Pet. 21) is meritless. It was for good reason that petitioners made no attempt in the court of appeals to challenge the district court's fact-finding. As the court of appeals explained, the district court documented "countless examples of deliberately false statements by [petitioners]," Pet. App. 45a, and the finding of intent to deceive rested on "hundreds" of subsidiary findings, *id.* at 38a; see also Part C, *infra*.

Moreover, the vast majority of the district court's findings establish historical facts—such as the fact that TI's president was warned in writing that "[o]ur basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes," Pet. App. 37a (brackets in original)—that would unquestionably be subject to review only for clear error even if *Bose* had some applicability here. See 466 U.S. at 514 n.31. Similarly, even where *Bose* is applicable, "special deference" is due "to the trial judge's opportunity to observe the demeanor of the witnesses." *Id.* at 499-500; see also *id.* at 500 (noting that deference to a trial judge's findings "tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours"). Here, the district court found that petitioners had engaged in "a multi-faceted, sophisticated scheme to defraud" (Pet. App. 2009a) after observing the live testimony of 84 witnesses, including many of petitioners' senior executives, over the course of a nine-month trial. *Id.* at 8a.

Petitioners highlight (PM Pet. 21) one sentence in the section of the court of appeals' decision on the likelihood of future violations suggesting that it "may not have reached all of the same conclusions as the district court." Pet. App. 67a; see *id.* at 50a. Such formulaic recitations of the clear-error standard, particularly where the parties have not contested the factual determinations of the district court, do not suggest that the result below would have been different if the panel had conducted "independent" review under *Bose*. Indeed, the immediately preceding sentence in the court of appeals' opinion observes that "examples in the record of [petitioners'] marketing campaigns and internal docu-

ments *amply support* the district court's conclusion that [petitioners] 'continue to make[] false and misleading statements regarding low tar cigarettes in order to reassure smokers and dissuade them from quitting.'" *Id.* at 67a (emphasis added; brackets in original).[11]

C. Petitioners' Fraud Was Not Protected By The First Amendment

Petitioners Reynolds and Lorillard contend (RJR Pet. 5-29; Lorillard Pet. 29-30) that the district court's judgment violates the First Amendment by imposing civil liability for constitutionally protected speech. They contend that their statements to the public in press releases, pamphlets, and television appearances are entitled to First Amendment protection as expressions of opinion "in an ongoing scientific and political debate." RJR Pet. 21; see Lorillard Pet. 29. Petitioners claim protection for their statements made to Congress and

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[11] Philip Morris cites three examples of purported "factual findings" it claims would be reversed under the standard of review it urges. PM Pet. 21; see *id.* at 21-23. First, it cites the district court's finding of specific intent, but it makes a legal argument, *i.e.*, that the court applied the wrong standard. Compare PM Pet. 21-22, with RJR Pet. 23-29 & 09-979 Pet. (Altria Pet.) 7-8. Second, it challenges the finding of fraud in connection with use of "low tar" and "light" descriptors, but, again, this is a legal claim (indeed, one that Reynolds claims is the subject of a circuit split, see RJR Pet. 30-32). Finally, Philip Morris claims the district court erred in concluding there was a "scientific consensus" on the dangers of environmental tobacco smoke and cancer in 1986. PM Pet. 22. As the court of appeals explained, however, this contention is "beside the point." Pet. App. 50a. "The district court based its finding of fraudulent intent not just on the existence of a consensus but also on evidence of [petitioners'] own knowledge" of the dangers of environmental tobacco smoke, and petitioners before the court of appeals "nowhere challenge the accuracy of * * * any of the district court's other findings suggestive of their knowledge" *Id.* at 50a-51a.

federal agencies under the *Noerr-Pennington* doctrine, an antitrust doctrine with underpinnings in the First Amendment's petition clause.

Those contentions lack merit. Although framed in terms of the First Amendment, petitioners' arguments in reality amount to belated factbound challenges to the district court's findings that their statements were fraudulent. Because the district court properly found that petitioners' statements satisfied all the traditional elements of fraud, the First Amendment issues petitioner identifies are not presented here. The court of appeals' decision upholding the district court's view of the evidence establishing fraud does not conflict with any decision of this Court or of another court of appeals. Further review of is therefore unwarranted.

1. "[I]t is well settled that the First Amendment does not protect fraud." Pet. App. 43a-44a (citing *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (the government "may, and does, punish fraud directly"). Petitioners do not contest that bedrock principle. Instead, they assert that the court of appeals failed to apply the traditional requirements of a fraud claim and therefore impermissibly extended the civil fraud statutes. Specifically, petitioners assert that unlike actionable fraud, their public statements were not false, material, or made with specific intent to defraud consumers of money or property. Each assertion is meritless, and none presents a legal question warranting review.

a. *Falsity.* Petitioners argue that their public pronouncements could not form the basis for fraud liability because they were not "false factual statements," but instead were assertions supporting "one side of a scientific debate." RJR Pet. 20 (citation, emphasis, and ellip-

sis omitted). It is unclear whether petitioners are continuing to assert that their statements about cigarettes are not in fact false—that, for example, it remains an open question whether cigarettes cause disease—or instead whether petitioners are asserting that their statements were not deliberately false at the time they were made. Either way, petitioner's contention fails in the face of the district court's extensive factual findings based on evidence that the court of appeals correctly labeled "overwhelming." Pet. App. 39a. As the court of appeals explained, the district court found that petitioners' statements were "clearly and deliberately false," and it provided "countless examples" of such "deliberately false statements." *Id.* at 45a.

The basis for the district court's findings included "decades of evidence that scientists within the [petitioner] corporations and outside scientists hired by the corporations and their joint entities were continually conducting research and reviewing the research of other scientists regarding cigarettes and health, addiction, nicotine and tar manipulation, and secondhand smoke." Pet. App. 35a. "The evidence at trial demonstrated that the results of this research—essential to the core of [petitioners'] operations, including strategic planning, product development, and advertising—were well known, acknowledged, and accepted throughout the corporations." *Ibid.* "These results established that cigarette smoking causes disease, that nicotine is addictive, that light cigarettes do not present lower health risks than regular cigarettes due to smoker compensation, and that secondhand smoke is hazardous to health." *Ibid.*

Trial testimony and internal company documents "demonstrate that [petitioners'] top officials were directly informed of negative research results," Pet. App.

37a, and "that the executives crafted their corporate priorities and strategies in response to these findings." *Id.* at 36a-37a. For example, Dr. William Farone, a Philip Morris scientist for 18 years whom the district court found to be "impressive and credible as both a fact and expert witness," *id.* at 35a-36a (quoting *id.* at 445a), testified that there was "widespread acceptance" at the company "that smoking caused disease," *id.* at 36a, that nicotine is addictive, *id.* at 37a-38a, and that petitioners' "superior knowledge of compensation * * * was closely held within Philip Morris and the tobacco industry." *Id.* at 38a. Indeed, petitioners' own documents support the finding that their statements were false, and deliberately so. TI's Vice President of Public Relations advised its President confidentially: "[O]ur basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." *Id.* at 37a (citation omitted).

Based on specific examples and "hundreds more findings" of fact, the court of appeals concluded that the district court had sufficient evidence from which to conclude that petitioners' "executives, who directed the activities of the [petitioner] corporations and their joint entities, knew about the negative health consequences of smoking, the addictiveness and manipulation of nicotine, the harmfulness of secondhand smoke, and the concept of smoker compensation," and that "[t]hese executives then made, caused to be made, and approved public statements contrary to this knowledge." Pet. App. 38a-39a; see *id.* at 45a (district court provided "countless examples of deliberately false statements by [petitioners]"). Those findings defeat petitioners' efforts to characterize their public statements as good-faith expres-

sions of opinion on a matter of legitimate disagreement. There is no reason for this Court to review both the district court's and the panel's evaluation of the trial record, which included nearly 14,000 exhibits and the testimony of nearly 250 witnesses, *id.* at 8a, especially given that petitioners disclaimed any challenge to the district court's factual findings below, see App., *infra*, 5a, 7a.

b. *Money or property.* Petitioner Reynolds advances the related argument that the statements on which the district court based fraud liability were "not directed to consumers" or aimed at obtaining their money or property, but rather addressed "important public controversies." RJR Pet. 15. This assertion contradicts the district court's factual findings. Reynolds asserts that "[n]either court below disputed that most of the allegedly 'fraudulent' speech was *not* designed to deprive consumers of money or property." RJR Pet. 14-15. That is simply incorrect: The district court specifically found that "the vast majority of [petitioners'] statements were made with the primary purpose of influencing smokers" and "potential smokers," as well as the general public, Pet. App. 1960a, while the court of appeals concluded that all of the racketeering acts on which the district court relied "were intended to defraud consumers," *id.* at 46a.

The premise of Reynolds' disagreement with the courts below is its assertion that any statement other than a "product advertisement" necessarily was not directed at consumers or intended to deprive them of money or property. See RJR Pet. 16 (contending that "98.9% of the 'fraudulent' public statements identified by the district court * * * were not product advertisements," and thus that such statements are "plainly not speech directed at consumers"). But a statement obvi-

ously need not take the form of an advertisement to be targeted at consumers or intended to persuade them to purchase cigarettes. To cite one particularly notable example, the Frank Statement itself was not a "product advertisement," but it was plainly targeted at consumers—indeed, it was entitled "A Frank Statement To Cigarette Smokers"—and the evidence at trial showed that, like petitioners' many other false public statements, the Frank Statement was designed to obtain money or property by persuading smokers to continue purchasing cigarettes. Pet. App. 128a; see, *e.g. id.* at 417a (noting that, according to petitioners' own documents, the open question strategy was intended to "give smokers a psychological crutch and a self-rationale to continue smoking").

c. *Materiality.* Petitioner Reynolds argues (Pet. 18-20) that both courts below erred in deeming its false statements material to consumers. Pet. App. 41a-43a. As with its challenge to the falsity findings, Reynolds' arguments on materiality amount to an attack on the district court's factual determinations and present no question of law warranting this Court's review.

Reynolds asserts that there was "not a scintilla of evidence or any district court finding that any of the challenged statements (excluding 'lights') were 'important to a reasonable person purchasing cigarettes.'" RJR Pet. 18 (quoting Pet. App. 42a). But the district court specifically found that petitioners' false statements were material to consumers, Pet. App. 1986a-1990a, and that petitioners intended the public to rely on their claims. *Id.* at 198a. Those findings of materiality, are neither speculative nor "counterintuitive." RJR Pet. 18. As the panel explained, the matters addressed in petitioners' false statements are important to a reasonable consumer "because each concerns direct and signifi-

cant consequences of smoking." *Id.* at 43a. "When deciding whether to smoke cigarettes, tobacco consumers must resolve initial reservations (or lingering qualms) about the potential for cancer, the risk of addiction, or the hazardous effects of secondhand smoke for friends, family, and others who may be exposed." *Ibid.*

The open question strategy itself shows materiality. That strategy reflected petitioners' recognition that, to meet their objectives, it was necessary only to create enough public uncertainty to reassure smokers that the connection between smoking and disease was an "open controversy," "not a closed case." Pet. App. 1752a (citation omitted). For similar reasons, there is no merit to Reynolds' contention (Pet. 19-20 & n.5) that its false statements could not be material because they contradicted "[t]he overwhelming public knowledge of smoking's health effects." Such contradiction was an integral part of the open question strategy. As Brown and Williamson observed in 1967: "Doubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public." Pet. App. 456a; see *id.* at 43a ("[Petitioners'] prevarications about each of these issues suggests full awareness of this obvious fact; reasonable purchasers of cigarettes would consider these statements important.").[12]

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[12] Reynolds incorrectly contends that the government was required to prove that identified consumers actually relied on petitioners' misrepresentations. As this Court has explained, "[u]sing the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation." *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2138 (2008). That is because the mail and wire fraud statutes "punish[] the scheme, not its success." *Pasquantino* v. *United States*, 544 U.S. 349, 371 (2005) (quoting *United States* v. *Pierce*, 224 F.3d 158, 166 (2d Cir. 2000)).

Reynolds is therefore incorrect in contending (RJR Pet. 6-7) that its First Amendment challenge resembles the one at issue in *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003). *Nike* involved non-fraudulent, freestanding corporate speech about public policy issues, not, as in this case, an integrated course of conduct designed to deceive and defraud consumers. As the government explained in the portion of its *Nike* amicus brief that Reynolds quotes in its petition (Pet. 6-7), the First Amendment concern in that case arose because the California law at issue permitted private suits challenging speech "that does not injure individuals or materially affect their purchasing decisions." U.S. Amicus Br. at 9, *Nike, supra*. In this case, by contrast, the district court specifically found, and the court of appeals correctly agreed, that petitioners' false statements both injured individuals and materially affected consumers' decisions about whether to purchase cigarettes. The issues in *Nike* therefore are not presented here. As the government noted in *Nike*, suits of this kind—based on "legislation that protect[s] purchasers of goods and services from deception, including fraud"—"are unquestionably compatible with the First Amendment." *Ibid.*

d. *Specific intent to defraud.* Reynolds contends (Pet. 23-28) that the court of appeals erred in upholding the district court's finding that it acted with specific intent to defraud consumers. Pet. App. 32a-41a. To the extent that this argument reflects disagreement with the district court's view of the evidence, it simply repeats the belated challenge to the district court's finding that petitioner's statements were deliberately false and fails for the same reasons. See pp. 35-38, *supra*. In addition to challenging the finding of falsity, however, Reynolds advances two specific arguments about the

manner in which the courts below determined that the specific-intent requirement was satisfied. Those arguments lack merit and do not warrant review.

i. First, Reynolds argues (Pet. 23-26) that the district court rested its specific-intent finding on an incorrect legal standard because, Reynolds contends, the court considered the "collective intent" of the corporation as a whole and did not require that any single employee act with specific intent to defraud. *Id.* at 23-24 (emphasis omitted).[13] That argument is incorrect. Although the district court mentioned a "collective knowledge doctrine," Pet. App. 1980a, the court made clear that a finding of specific intent requires proof that a person with authority to act on behalf of the corporation possessed the requisite wrongful intent or acted with reckless disregard for or willful blindness to the truth. *Id.* at 1981a. Indeed, the district court noted that, in *Saba* v. *Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (1996), the D.C. Circuit stated that "the proscribed intent (willfulness) depend[s] on the wrongful intent of specific employees." *Ibid.* The district court also specifically rejected the proposition "that aggregation of different states of minds of various corporate actors is sufficient to demonstrate specific intent in cases where individuals within a corporation make fraudulent statements." *Ibid.*

The district court's analysis is consistent with the court of appeals' articulation of the governing legal principles, which Reynolds does not dispute. As the court of appeals explained, see Pet. App. 32a-34a, "[c]orporations

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[13] Petitioner Altria presents a separate statutory argument premised on a challenge to the legal standard the district court applied in determining whether Altria acted with specific intent to defraud. See Altria Pet. 7-10. That argument is addressed in Part H, *infra*.

may be held liable for specific intent offenses based on the 'knowledge and intent' of their employees." *Id.* at 33a (quoting *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 495 (1909)). "Because a corporation only acts and wills by virtue of its employees, the proscribed corporate intent depends on the wrongful intent of specific employees." *Ibid.* A showing of specific intent does not require that individual officers or employees personally testify to their frame of mind. "A person's state of mind is rarely susceptible of proof by direct evidence, so specific intent to defraud may be, and most often is, inferred from the totality of the circumstances, including indirect and circumstantial evidence." *Ibid.*

Applying these principles, the court of appeals correctly upheld the district court's finding that Reynolds acted with specific intent to defraud. As the panel explained, the district court concluded "that the chief executive officers and other highly placed officials in the [petitioner] corporations made or approved statements they knew to be false or misleading, evincing their specific intent to defraud consumers." Pet. App. 34a. In light of the "overwhelming evidence" that petitioners knew of the toxicity and addictiveness of their products, the district court explained that "it is absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent." *Id.* at 1890a; see *id.* at 1984a (noting that, "[i]n the majority of instances, the authors of the fraudulent statements alleged as Racketeering Acts were executives, including

high level scientists—CEOs, Vice Presidents, Heads of Research & Development, not entry level employees.").[14]

Thus, contrary to Reynolds' assertions (Pet. 24-25), the district court did in fact find, properly based on inferences from "overwhelming" evidence, that petitioners' executives knew the information that rendered their public statements false and misleading—in other words, that they acted with specific intent to defraud. The court of appeals therefore correctly held that the "district court did not commit legal error by imputing to [petitioners'] executives knowledge of the falsity of their statements based on inferences reasonably drawn from the facts shown." Pet. App. 35a.

As noted, the district court explicitly disavowed the "collective intent" theory that petitioner attributes to it.

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[14] Petitioner Reynolds challenges the validity of the district court's inference of knowledge on the ground that "most of the alleged 'fraud' was statements by the Tobacco Institute." RJR Pet. 26 (emphases omitted). But even if that were true, Reynolds did not dispute its responsibility for TI's conduct in the court of appeals, and for good reason. As the panel explained, petitioners (including Reynolds) created TI, staffed its board and its committees, and used TI (along with other joint entities) to conduct their "joint public relations through false and misleading press releases and publications." Pet. App. 9a; see also *id.* at 183a (petitioners funded TI's operations with contributions exceeding $600 million). Indeed, the district court found that petitioners formed TI to serve as their collective spokesperson on matters of smoking and health and to provide a confidential forum in which to refine and coordinate their fraudulent scheme. See generally *id.* at 177a-230a. Petitioners structured their operations in this way because, as the TI Executive Committee stressed, it was "of prime importance that the industry maintain a united front and that if one or more companies were to conduct themselves as a matter of self interest, particularly in advertising, obvious vulnerability would be the result." *Id.* at 218a (citation omitted). Petitioners' effort to characterize TI as "a separate entity" (RJR Pet. 26) is thus squarely at odds with the record.

Pet. App. 1981a. But even if it had not, the court of appeals explained that the district court "relied on a permissible view of specific intent," *id.* at 41a, finding that the individuals who made and directed the fraudulent statements in fact knew that those statements were false. See *id.* at 1890a. Because the district court's "conclusions based on the proper standard are sufficient to uphold its judgment," *id.* at 41a, the court of appeals correctly found no need to decide the validity of the "collective intent" theory that petitioners challenge here. Accordingly, the validity of that theory is not presented for this Court's review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

ii. Second, Reynolds contends Pet. 27-29) that it was deprived of due process because it was denied the opportunity to "show[] that all corporate statements accurately reflected the prevailing internal views—and certainly the speakers' views." RJR Pet. 27, 28-29. The record in the district court belies the assertion that Reynolds was "tricked" into "putting on no defense on a hotly contested issue." *Id.* at 28.

Reynolds had every opportunity and incentive in the nine-month trial in this case to establish, by oral testimony or otherwise, the exceedingly unlikely proposition that its executives believed the public statements made on behalf of the corporation. In their opening statement, petitioners declared that "the evidence will show, Your Honor, these defendants gen[uine]ly believed their positions, advanced legitimate assessments of the science, and made statements with no intent whatsoever to mislead or to defraud anybody." 9/22/04 Tr. 337. The government then presented volumes of evidence establishing petitioners' specific intent to deceive. As the

court of appeals explained, "[t]he government presented evidence indicating that specific high-ranking corporate officials were directly informed" about "the negative health consequences of smoking, the addictiveness and manipulation of nicotine, the harmfulness of secondhand smoke, and the concept of smoker compensation," and that "[t]hese executives then made, caused to be made, and approved public statements contrary to this knowledge." Pet. App. 38a-39a.[15] The central dispute at trial was whether the statements made by petitioners and their employees "accurately reflected" the "prevailing internal views" of the corporation and the speaker. RJR Pet. 28-29. It is simply implausible that Reynolds possessed but deliberately withheld exculpatory evidence that not only would have disproved the showing Reynolds contended the government was required to make but also would have rebutted the specific evidence the government presented. Reynolds' factbound claim of unfairness lacks any merit and does not warrant this Court's review.

2. Petitioners Reynolds and Lorillard contend (RJR Pet. 7-8, 17-18; Lorillard Pet. 29-30) that a subset of their public statements—those directed in the first instance toward Congress or other governmental agencies—enjoy protection under the *Noerr-Pennington*

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[15] Indeed, the government's post-trial brief provided more than 20 pages of "examples of particular executives, employees, and agents of [petitioners] who possessed the specific intent required under the mail and wire fraud laws," with citations to the supporting record evidence. C.A. App. A1393-A1414. Petitioners made no attempt to rebut this evidence in the district court, claiming only that the officers who made or approved petitioners' false statements might have "personally believed" the statements were true despite a wealth of contradictory evidence. *Id.* at A1489 (citing petitioners' joint post-trial brief).

doctrine. The court of appeals correctly rejected that contention, which does not present any legal issue warranting review.

The *Noerr-Pennington* doctrine bears only slight, if any, relevance to this case. Under that doctrine, "[t]hose who petition government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993); see *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (*Noerr*); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669 (1965). Were this an antitrust case, the *Noerr-Pennington* doctrine might have some conceivable bearing. But as the court of appeals explained, Pet. App. 44a-46a, this case concerns fraud on consumers; petitioners' liability rests on their use of the mails and wires while executing a scheme to defraud cigarette purchasers of their money. 18 U.S.C. 1341, 1343 (Supp. II 2008).[16] This Court has never suggested, and petitioners cite no case holding, that the *Noerr-Pennington* doctrine confers some sort of generalized immunity from laws punishing consumer fraud. See Pet. App. 44a-45a.[17]

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[16] Petitioner Reynolds argues (Pet. 16) that its speech before Congress or other government agencies does not constitute "consumer fraud" because it "was not directed to consumers." But the same statements may be intended both to influence government agencies and to defraud consumers of money or property. The district court's findings make clear that what petitioners describe as their "*Noerr-Pennington* speech" was in fact an integral part of petitioner's overall strategy to portray the health effects of smoking as an "open question" and thereby to obtain money from cigarette smokers by means of false representations.

[17] Petitioners are thus mistaken in claiming (PM Pet. 26 n.4; RJR Pet. 18)) that the decision below conflicts with other circuits' application of

Similarly, while *Noerr-Pennington* immunity stems in part from First Amendment right-to-petition concerns, see *Noerr*, 365 U.S. at 138, this Court has stressed that "[t]he Petition Clause * * * was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble[,] * * * and there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985); see *id.* at 484 (concluding that "petitions to the President that contain intentional and reckless falsehoods do not enjoy constitutional protection") (internal quotation marks and citation omitted).

Petitioners appear to contend that the *Noerr-Pennington* doctrine confers immunity from all liability for any speech—even knowingly false statements—that is addressed to a government agency and takes the form of "efforts to affect governmental regulation." Lorillard Pet. 29-30; see RJR Pet. 17. But that sweeping proposition cannot be squared with established and unquestionably constitutional prohibitions against making false statements to Congress, federal agencies, and the federal courts. See, *e.g.*, 18 U.S.C. 1001 (prohibiting false statements to the federal government); 18 U.S.C. 1621 (perjury of witnesses); see also *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (explaining that federal law "amply empowers the [Food and Drug Administration] to punish and deter fraud against the Administration").

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the *Noerr-Pennington* doctrine. All of the cases on which petitioners rely, like *Noerr* itself, involved immunity from antitrust claims. None involved consumer fraud.

In any event, the scope of the *Noerr-Pennington* doctrine is not squarely presented in this case. As a precautionary measure, the district court excluded evidence of certain testimony petitioners' executives provided to Congress. See Pet. App. 46a; *id.* at 1962a-1963a. Even if those statements were properly excluded, a question the court of appeals found no need to resolve, see *id.* at 46a, the district court specifically found "that the vast majority of [petitioners'] statements were made with the primary purpose of influencing smokers, potential smokers, and the general public and are, therefore, not protected by the *Noerr-Pennington* doctrine." *Id.* at 1960a; see *id.* at 46a (concluding that, even if petitioners' congressional testimony was properly excluded, petitioners' "remaining acts were intended to defraud consumers, so *Noerr-Pennington* protection does not apply"). Indeed, even if the district court had excluded from consideration not just congressional testimony but all of petitioners' statements to the FTC and other federal regulators, the record would still contain ample evidence—including misleading marketing materials, press releases, statements on television talk shows, and advertising campaigns—to support the finding of a scheme to defraud consumers. In view of that record, the question that Reynolds seeks to raise (RJR Pet. 17)—whether First Amendment protection applies to deliberate deception of regulatory bodies and legislators in pursuit of a fraudulent scheme aimed at consumers—is not properly presented.

D. Petitioners' Statements About "Light" And "Low-Tar" Cigarettes Were Fraudulent And Not Authorized By The FTC

Petitioners Reynolds and Philip Morris (RJR Pet. 29-34; PM Pet. 29-30) contend that the court of appeals erred in upholding fraud liability based on their advertising of "light" and "low-tar" cigarettes. That contention is based on two arguments, neither of which has merit or warrants review.

First, petitioners argue that "they should be immune from liability because the [FTC] * * * has blessed their use of labels such as 'light' and 'low tar.'" Pet. App. 46a-47a. But as the court of appeals explained, that argument is "entirely foreclosed" by this Court's decision in *Altria*, which held that "the FTC has in fact never required that cigarette manufacturers disclose tar and nicotine yields, nor has it condoned representations of those yields through the use of 'light' or 'low tar' descriptors." Pet. App. 47a (quoting *Altria*, 129 S. Ct. at 550).

Second, petitioners contend that their "light" and "low tar" descriptors were not actionable under the fraud statutes because although such statements "could be interpreted to imply a health benefit, that is not the only reasonable interpretation that could be drawn from the terms." Lorillard Pet. 30-31; see also RJR Pet. 30. The district court found, however, that petitioners knew and intended that consumers would interpret "light" and "low tar" descriptors to convey a health benefit, see Pet. App. 1068a-1096a, even though petitioners "have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading." *Id.* at 46a (quoting *id.* at

1905a-1906a); see *id.* at 1140a-1147a, 1255a-1256a. There is also no merit to petitioners' characterization of "light" and "low tar" descriptors as "simply verbal representations of numerical ratings authorized by the FTC." *Id.* at 49a. That argument "founders on the district court's finding that 'there are lights of certain brands with higher tar levels than regulars of other brands from the same company, and there are also lights and regulars of the same brands that have the same FTC tar rating.'" *Ibid.* (quoting *id.* at 1907a); see *id.* at 1142a (finding that the terms "light" and "low tar," as used by petitioners, are empirically "meaningless" and "arbitrary"). This evidence, "which [petitioners] do not attempt to show is clearly erroneous, reveals the descriptors were not simply representations of numerical ratings and thus were not 'literally true.'" *Id.* at 49a.

In any event, the "fraudulent activity surrounding 'light' cigarettes was not merely limited to the use of misleading descriptors." Pet. App. 48a. The district court found, for example, that petitioners' public statements about the demand for light cigarettes were "blatantly false," *id.* at 1906a; that petitioners "withheld and suppressed their extensive knowledge and understanding of nicotine-driven smoker compensation," *id.* at 1907a; and that petitioners intentionally designed their light cigarettes to facilitate smokers' ability to compensate and thereby obtain the required dosage of nicotine to remain addicted, *id.* at 1905a. See generally *id.* at 775a-850a (describing petitioners' efforts to "design commercial cigarettes that were capable of delivering nicotine across a range of doses that would keep smokers addicted," including through filter design, the placement of ventilation holes, paper porosity, and alterations

to the chemical form of the nicotine delivered to smokers' brains).

E. Neither The Master Settlement Agreement Nor The Passage Of The Family Smoking Prevention And Tobacco Control Act Eliminated All Likelihood Of Future Violations

Both courts below properly found that an injunction was warranted, especially given petitioners' vast, decades-long fraudulent enterprise. Pet. App. 60a-67a, 2007a-2021a; see 18 U.S.C. 1964(a) (injunctions available under RICO to "prevent and restrain violations"). This Court has long recognized that "[i]n exercising its equitable jurisdiction, [a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (internal quotation marks and citation omitted). Petitioners Philip Morris and Lorillard nonetheless contend that the Master Settlement Agreement (MSA) and the FSPTCA "[f]oreclose [f]uture [r]acketeering" and thus "extinguished the district court's jurisdiction." PM Pet. 28; see *id.* at 28-31; Lorillard Pet. 31-32. Petitioners do not contend that the district court's injunction conflicts with any decision of this Court or any court of appeals, and their challenge is without merit.

1. Petitioners erroneously contend that the injunctive relief ordered in this case was barred by the MSA —an agreement between state attorneys general and some tobacco companies settling tort and reimbursement suits through a variety of state-specific injunctions and consent decrees, see Pet. App. 61a-66a, 1864a-1870a. As an initial matter, they cite no authority whatsoever

for the proposition that a racketeer's settlement of other causes of action with other parties can strip a federal district court of "jurisdiction" to provide injunctive relief for the United States in a RICO case. PM Pet. 28; see Pet. App. 62a (characterizing this argument by petitioners as "odd"); cf. *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) ("[I]njunctive relief is not barred by a defendant's disclaimer of an intent to violate the law in the future."). In any event, this contention ignores the district court's express factual findings regarding petitioners' violations of the MSA, as well as the settlement's inadequacy when compared to the injunction issued here.

As the court of appeals found, petitioners "cannot hide behind the MSA to avoid the imposition of RICO remedies when they do not comply with the agreement." Pet. App. 66a. Those petitioners subject to the MSA "began to evade and at times even violate the MSA's prohibitions almost immediately after signing the agreement." *Id.* at 64a. For example, "although the MSA required [petitioners] to dissolve CIAR, only two days after signing the MSA Lorillard's general counsel wrote to Philip Morris, Reynolds, and Brown & Williamson asking to 'discuss the status of the plan to reinstate CIAR.'" *Ibid.* (citation omitted). "Shortly thereafter, Covington & Burling LLP informed the CIAR contractors '[t]he members of CIAR have decided to create a new organization to continue the work. . . . The members of CIAR that will be members of the new organization intend to continue to fund the research." *Id.* at 64a-65a (citation omitted). "Subsequently, in 2000, Philip Morris initiated a new research program that had the same offices, phone numbers, and board as CIAR and many of the same employees, management, researchers,

peer reviewers, and grantees." *Id.* at 65a; see also *ibid.* ("CIAR is not the lone example of [petitioners'] organizations poised to circumvent the MSA's prohibitions against joint activities or participation in an enterprise.").

Moreover, as further "evidence of the MSA's failures and pitfalls, the district court noted that despite the MSA [petitioners] still fraudulently denied the dangers of secondhand smoke, marketed 'low tar' cigarettes as a healthier alternative to quitting, and falsely denied manipulating nicotine delivery and marketing to youth." Pet. App. 66a; see also *id.* at 1873a-1877a (summarizing additional MSA violations by petitioners); *id.* at 2044a ("[Petitioners] continue to make affirmative statements on smoking and health issues that are fraudulent."). Petitioners offered "no rebuttal" to these factual findings. *Id.* at 66a.

Additionally, the MSA does not include core components of the injunctive relief ordered in this case. See Pet. App. 1884a (MSA does not enjoin against future RICO violations, regulate "'light' and 'low tar'" descriptors, require corrective statements, or fund smoking cessation programs.).

Finally, the States "could not be relied upon to 'vigorously' enforce the MSA," Pet. App. at 66a (citation omitted); some provisions of the MSA had either expired at the time of the district court's order or were on the cusp of expiring, *ibid.*; and BATCo and Altria were not even parties to the MSA, *ibid.*; see *id.* at 1879a. The MSA is no substitute for the injunction ordered in this case, and it certainly did not deprive the district court of "jurisdiction" to enter injunctive relief.

2. Shortly after the panel decision was issued, Congress enacted the FSPTCA, Pub. L. No. 111-31, 123

Stat. 1776. Congress specifically cited the district court's findings in this case in its own legislative findings, see § 2(47)-(49), 123 Stat. 1781, and instructed that "[n]othing" in the new Act "shall be construed to * * * affect any action pending in Federal, State, or tribal court," § 4(a), 123 Stat. 1782. Nonetheless, several petitioners filed a Suggestion Of Mootness And Motion For Partial Vacatur ("Suggestion Of Mootness") in the court of appeals, arguing that the new law rendered aspects of the injunction "moot." The government opposed the motion, explaining that the legislation was not co-extensive with the injunction in this case and arguing that any request to modify the injunction should be presented to the district court in the first instance. The panel denied the Suggestion Of Mootness. See PM Pet. 1. The court of appeals also denied Philip Morris's petition for rehearing en banc, which made a similar argument. See Pet. App. 2183a.

Review of the court of appeals' summary rejection of petitioners' claims regarding the new legislation is not warranted. See PM Pet. 29-31; Lorillard Pet. 31-32. Petitioners can assert their claim that the injunction in this case should be modified in light of the new law in the district court, which is the appropriate forum to consider it in the first instance. See *Horne* v. *Flores*, 129 S. Ct. 2579, 2593 (2009) (party subject to an injunction may seek relief from the district court in light of changed circumstances). In particular, that court is better situated to evaluate petitioners' factual contention that the new legislation renders it unlikely that they "will engage in future joint racketeering activity of the type the district court found and on which it premised its forward-looking injunctive relief." PM Pet. 30. The district court's disposition of such a request would then be

reviewable in the court of appeals and, if necessary, in this Court. Review now is premature.

Allowing the district court to evaluate this contention in the regular course is especially appropriate in light of the fact that petitioners Reynolds and Lorillard, as well as other plaintiffs, have brought a First Amendment challenge to the FSPTCA. See *Commonwealth Brands, Inc.* v. *United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010), appeal pending, Nos. 10-5234 and 10-5235 (6th Cir. filed Mar. 9, 2010). Petitioners cannot establish that the new law "dispels any doubt" about whether they will engage in future racketeering, PM Pet. 30, while two of them are simultaneously attempting to invalidate the legislation.[18]

Nor is there any merit to Philip Morris's cursory suggestion that the new legislation renders this case moot. PM Pet. 30-31. That very contention was rejected by Congress in the text of the Act itself. § 4(a), 123 Stat. 1782. In an attempt to alter the meaning of this text, Philip Morris points to some of the legislation's provisions that address topics also covered by the injunction, but it does not and cannot claim that the new law wholly duplicates the district court's injunction. For example, the Act does not purport to provide tailored remedies for decades of fraud, such as the corrective statements ordered by the district court. Nor does it provide any redress for the harm to the millions of victims of petitioners' scheme who, as petitioners intended,

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[18] Philip Morris argues in the alternative that this Court should grant, vacate, and remand to allow the court of appeals to consider its argument regarding the impact of the new legislation. PM Pet. 28, 31. But the court of appeals has already considered the impact of the new legislation, denying petitioners' Suggestion Of Mootness and petitions for rehearing en banc, so a GVR would not be appropriate.

continue to purchase cigarettes because they have become chemically dependent on nicotine. See Gov't Pet. at 29-31, *United States* v. *Philip Morris USA, Inc.*, No. 09-978 (filed Dec. 10, 2009).

F. The Court Of Appeals Correctly Upheld The Injunction Prohibiting Specified Conduct And Requiring Corrective Statements

1. The district court enjoined petitioners from "committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences, or sale of cigarettes in the United States," Pet. App. 2069a, and from "making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes," *id.* at 2070a. Petitioners contend that these provisions are too vague to satisfy Fed. R. Civ. P. 65(d). PM Pet. 31-34; Lorillard Pet. 32. That claim, which involves application of settled law to the particular circumstances of this case, does not warrant this Court's review and is meritless in any event.

RICO specifically authorizes district courts to "prohibit[] any person from engaging in the same type of endeavor as the enterprise engaged in," 18 U.S.C. 1964(a), and that is precisely what the district court did in this case. This is not a case in which the district court "enjoin[ed] all future illegal conduct of the defendant" or even all future violations of RICO "however unrelated to the violation found by the court." *Zenith Radio Corp.*, 395 U.S. at 133. Instead, the court exercised its

well-established equitable authority to enjoin petitioners "from committing other related unlawful acts." *Ibid.* In doing so, there was no requirement "that all of the untraveled roads to that end be left open and that only the worn one be closed." *Ibid.* As the district court explained, "Rule 65(d) does not require the [d]istrict [c]ourt to 'predict exactly what [petitioners] will think of next," especially since "it would be impossible to foresee what the ingenuity and creativity of [petitioners'] cadres of sophisticated lawyers could 'think of next.'" *United States* v. *Philip Morris USA, Inc.*, 477 F. Supp. 2d 191, 196 (D.D.C. 2007) (quoting *S.C. Johnson & Son, Inc.* v. *Clorox Co.*, 241 F.3d 232, 240 (2d Cir. 2001)).

The cases that Philip Morris cites (Pet. 32-33) are inapposite. In *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (1945), this Court held that an order prohibiting acts "as charged in the complaint" was impermissible under Rule 65(d), which bars courts from describing the acts enjoined "by referring to the complaint." *Id.* at 410; see Fed. R. Civ. P. 65(d)(1)(C). In *International Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967), the Court vacated an injunction purporting "to enforce an arbitrator's award" where that award "contain[ed] only an abstract conclusion of law, not an operative command capable of 'enforcement.'" *Id.* at 74. Here, the district court order did not refer to the complaint or direct the "enforcement" of abstract conclusions of law. And it "specified the matters about which [petitioners] are to avoid making false statements or committing racketeering acts: the manufacturing, marketing, promotion, health consequences, and sale of cigarettes, along with related issues that [petitioners] have reason to know are of concern to cigarette consumers." Pet. App. 73a-74a.

The court of appeals concluded that the injunction "sufficiently specif[ied] the activities enjoined as to provide [petitioners] with fair notice of the prohibited conduct," given that the district court "did not abstractly enjoin [petitioners] from violating RICO or making false statements, but instead specified the matters about which [petitioners] are to avoid making false statements or committing racketeering acts." Pet. App. 73a-74a. The court of appeals went on to observe that separate and apart from the clear terms of the injunction itself, "the context of the district court's legal conclusions and 4,088 findings of fact about fraud in the manufacture, promotion, and sale of cigarettes" provided yet more clarity. *Id.* at 74a. Petitioners argue that this observation by the court of appeals "squarely contravene[d] Rule 65(d)" by referring to the findings of fact. PM Pet. 33; see Fed. R. Civ. P. 65(d)(1)(C) ("Every order granting an injunction * * * must * * * describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."). An appellate opinion cannot "contravene[]" this rule (PM Pet. 33), for it is not an "order granting an injunction," Fed. R. Civ. P. 65(d)(1). The district court's injunction order did not rely on the findings of fact to provide specificity or otherwise violate Rule 65(d).

At bottom, petitioners' objection is not that the injunction is unclear, but that it happens to be broad. But Rule 65(d) limits vague injunctions, not comprehensive ones, and this Court has stressed that broad decrees prohibiting future violations of a statute are "wholly warranted" "where a proclivity for unlawful conduct has been shown." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (concluding that an order "enjoin[ing] any practices which were violations of th[e] statu-

tory provisions" was justified by the defendant's "record of continuing and persistent violations"). That is exactly what the record established here. Pet. App. 74a (citing *McComb*, 336 U.S. at 192).

2. The district court also ordered petitioners to publish corrective statements on their websites, as a one-time full-page advertisement in thirty-five major newspapers, and in ten advertisements on a major television network over the course of one year. Pet. App. 83a. "The court chose these media in order to 'structure a remedy which uses the same vehicles which [petitioners] have themselves historically used to promulgate false smoking and health messages." *Ibid.*; see also *id.* at 2047a-2048a. The district court found such statements appropriate to counteract decades of false and misleading statements by petitioners concerning the health effects of smoking and nicotine addiction, commercial speech that even at the time of the court's order "continue[d] to omit material information or present information in a misleading and incomplete fashion." *Id.* at 2043a; see *id.* at 86a (all such statements were "attempts to persuade the public to purchase cigarettes"). The court of appeals properly concluded that against the background of petitioners' false and fraudulent statements to consumers about their products over 50 years, the publication of appropriate corrective statements addressing petitioners' false assertions in the same media petitioners themselves have used is a suitable means of preventing petitioners from continuing to deceive their customers. *Id.* at 83a-89a.

The court of appeals affirmed this aspect of the district court's order only in the abstract, however, noting that the content of the corrective statements has not yet been determined. See Pet. App. 88a. Indeed, the dis-

trict court said it would determine the content of the corrective statements based on submissions by both the United States and petitioners, *id.* at 2048a-2049a, so petitioners themselves will have an opportunity to shape the statements. Accordingly, review of the corrective statements requirement by this Court at this time, as petitioner Reynolds urges (Pet. 34-36), would be premature.

The court of appeals cautioned the district court that the statements must be "carefully phrased so they do not impermissibly chill protected speech." Pet. App. 88a. "Consequently, the court must confine the statements to 'purely factual and uncontroversial information,' geared towards thwarting prospective efforts by [petitioners] to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions." *Ibid.* (quoting *Zauderer* v. *Office of Disciplinary Counsel of Sup. Ct.*, 471 U.S. 626, 651 (1985)). The court of appeals concluded that "*[a]ssuming the corrective advertising once drafted meets these requirements*, it is a permissible restraint on [petitioners'] commercial speech." *Id.* at 89a (emphasis added). This Court could not meaningfully evaluate petitioner Reynolds' claim that the corrective statements will violate the First Amendment and RICO without knowing what the corrective statements are.

Reynolds erroneously contends (Pet. 35) that the court of appeals' affirmance of a corrective statement obligation in the abstract conflicts with *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978). In that deceptive advertising case, the Seventh Circuit modified an FTC order requiring corrective statements on the ex-

press ground that the case did *not* involve "a long history of deception" that had "permeated the consumer mind." *Id.* at 164. That is precisely what the district court found here. See Pet. App. 2047a-2048a. Indeed, the Seventh Circuit contrasted the record before it with the D.C. Circuit's decision in *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749 (1977), cert. denied, 435 U.S. 950 (1978), which sustained a corrective advertising requirement as a remedy for decades of false advertising. See *id.* at 769 (upholding corrective statements because, after fifty years of false claims, "advertising which fails to rebut the prior claims * * * inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly"). Likewise here, the panel explained, petitioners "violated RICO by making false and fraudulent statements to consumers about their products" for "over fifty years." Pet. App. 88a.

G. The Court Of Appeals Correctly Rejected BATCo's Claim That This Case Involves An Extraterritorial Application Of RICO

BATCo contends that the decision below conflicts with decisions of other courts of appeals holding that RICO does not apply to conduct occurring outside the United States merely because it has "effects" in the United States. 09-980 Pet. (BATCo Pet.) 10. This case, however, does not provide any occasion for resolving the asserted conflict. In addition to engaging in overseas conduct with effects in the United States, BATCo engaged in extensive conduct within the United States, and it also conspired with U.S.-based petitioners. BATCo may therefore be held liable for violations of RICO's substantive and conspiracy provisions without

regard to any foreign conduct, and this case does not involve extraterritorial liability under the test used by any of the courts of appeals. In any event, the cases giving rise to the asserted conflict involved private civil RICO damages actions, in which the plaintiffs were required to show that the defendants' actions had proximately caused their injuries. Those decisions are not relevant to this case, which arises from an action by the United States for equitable relief under Section 1964(a)—a provision that does not impose a proximate-causation requirement.

1. The premise of BATCo's petition is that its liability rests on "wholly foreign conduct." Pet. i; see *id.* at 13 (arguing that "this Court has long treated laws as having extraterritorial reach if they apply to *conduct that occurs in a foreign country*"). That is incorrect. BATCo is liable under RICO's substantive provision because it used the interstate mails and wires—and engaged in other conduct within the United States—in furtherance of a scheme that was aimed at defrauding American consumers. Such an application of RICO presents no issue of extraterritoriality. See *Pasquantino* v. *United States*, 544 U.S. 349, 371 (2005) (application of the wire-fraud statute did not have extraterritorial effect where defendants "used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue"); *Environmental Def. Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) ("Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States."); *Alfadda* v. *Fenn*, 935 F.2d 475, 479-480 (2d Cir.), cert. denied, 502 U.S. 1005 (1991); *Republic of*

the Philippines v. *Marcos*, 862 F.2d 1355, 1358-1359 (9th Cir 1988) (en banc), cert. denied, 490 U.S. 1035 (1989).

This Court has explained that "[m]ail fraud * * * occurs whenever a person, 'having devised or intending to devise any scheme or artifice to defraud,' uses the mail 'for the purpose of executing such scheme or artifice or attempting so to do.'" *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2138 (2008) (quoting 18 U.S.C. 1341). "[T]he indictable act under § 1341 is not the fraudulent misrepresentation, but rather the use of the mails with the purpose of executing or attempting to execute a scheme to defraud." *Id.* at 2140; see *Pasquantino*, 544 U.S. at 355 n.2 (noting that the Court has adopted a parallel construction of the identical language of the wire-fraud statute, 18 U.S.C. 1343). Thus, in *Pasquantino*, this Court rejected the argument that the application of the wire-fraud statute to a scheme to defraud the Government of Canada of liquor-tax revenues gave the statute extraterritorial effect, emphasizing that the defendants in that case "used U.S. interstate wires to execute a scheme to defraud." 544 U.S. at 371. Because the defendants' "offense was complete the moment they executed a scheme inside the United States," the Court explained, the "domestic element of [their] conduct is what the Government is punishing." *Ibid.*

Like the offenses in *Pasquantino*, BATCo's predicate offenses were consummated when it used the United States mails and wires in furtherance of petitioners' fraudulent scheme. See, *e.g.*, Pet. App. 1851a-1852a (describing BATCo's practice of delivering sensitive research reports to petitioners in the United States by sending unmarked envelopes to an attorney in Kentucky); *id.* at 591a-592a (BATCo sent report documenting the phenomenon of nicotine compensation to B&W

in the United States); *id.* at 690a (BATCo sent research on the physiological effects of nicotine to B&W in the United States); see also *id.* at 2145a. Indeed, before trial, BATCo stipulated that it had used the U.S. mails and wires as alleged by the government in eleven separate instances, including mailings to BATCo's United States affiliate B&W. See BATCo Pet. 3 n.3 (describing BATCo's affiliation with B&W); Gov't Exh. 86,700, ¶ 1 (stipulating that the documents identified in Racketeering Acts 11, 30, 50, 51, 53, 54, 57, 60, and 63 were "transmitted via U.S. mails as that term is used in 18 U.S.C. § 1341" and that "[a]ll requirements for mailing pursuant to 18 U.S.C. § 1341 have been satisfied with respect to" those mailings); *id.* ¶¶ 2-3 (similar stipulation for wire-fraud offenses). BATCo's various claims (Pet. 5 n.4) that its mailings were "unpublished," were not "directed at U.S. consumers," and did not "describe[] statements or conduct by BATCo in the United States" are irrelevant under the mail-fraud statute, which prohibits *any* use of the mails in furtherance of a scheme to defraud.. See *Bridge*, 128 S. Ct. at 2138. In light of its stipulations, BATCo cannot now contend (Pet. 31) that its liability rests on "wholly foreign conduct."

Moreover, BATCo's domestic conduct in furtherance of the U.S.-based scheme to defraud extended well beyond its use of the mails and wires: the district court also documented BATCo's direct and extensive participation in petitioners' enterprise in the United States. For example, BATCo was the organizer of a nicotine pharmacology conference for petitioners in South Carolina. Pet. App. 848a-849a. Its representatives attended TI's "College of Tobacco Knowledge" for training in the enterprise's coordinated public-relations messages. *Id.* at 221a-222a. They also attended meetings in

the United States of the joint industry groups that were used to coordinate the affairs of the enterprise. See, *e.g.*, *id.* at 326a-327a (ICOSI meeting in Kansas City, Missouri); *id.* at 332a-333a (INFOTAB meeting in Washington, D.C.). BATCo maintained "frequent and direct" contacts with "high level smoking and health research scientists" at the U.S.-based TI Research Committee and the CTR, including frequent visits to the United States by BATCo scientists and executives. *Id.* at 138a-139a. BATCo operated an experimental tobacco farm in North Carolina for producing tobacco that was genetically engineered to yield extra nicotine. *Id.* at 788a. And BATCo sold millions of cigarettes in the United States through a marketing agreement with a Reynolds subsidiary. *Id.* at 2022a n.83.

In sum, even without the actions taken by BATCo abroad in furtherance of the scheme to defraud United States consumers, there was ample evidence to support BATCo's liability under RICO. Although the court of appeals had no occasion to discuss BATCo's conduct within the United States, the government argued that BATCo's liability could be sustained on that basis, see Gov't C.A. Br. 175-177, and it would provide an alternative ground for affirming the judgment below.

2. In addition to violating RICO's substantive provisions, BATCo also engaged in a RICO conspiracy, in violation of 18 U.S.C. 1962(d). Pet. App. 1991a-2002a. Under RICO, a conspirator is liable for the acts of its co-conspirators undertaken in furtherance of the conspiracy, *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997), and it is well established that a co-conspirator outside the United States may be held liable for substantive offenses committed in furtherance of a conspiracy by conspirators inside the United States. See, *e.g.*, *Ford* v.

United States, 273 U.S. 593, 619-624 (1927) (defendants whose conspiratorial activity occurred outside the United States were liable for conspiracy to violate United States law because of conduct of other conspirators within the United States); accord *United States* v. *Inco Bank & Trust Corp.*, 845 F.2d 919, 920 (11th Cir. 1988) ("It is well settled that the government has the power to prosecute every member of a conspiracy that takes place in United States territory, even those conspirators who never entered the United States."); *United States* v. *Winter*, 509 F.2d 975, 982 (5th Cir.), cert. denied, 423 U.S. 825 (1975). Since there is no dispute that the conduct of BATCo's co-conspirators occurred in the United States, that principle—which BATCo does not address—provides an independent basis for the decision below.

3. The court of appeals based its decision on the "substantial domestic effects" of BATCo's overseas conduct. Pet. App. 58a. As the court correctly explained, "[b]ecause conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting this 'effects' test is '*not* an *extraterritorial* assertion of jurisdiction.'" *Ibid.* (quoting *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984)).[19] According to

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[19] The evidence amply supported the conclusion that BATCo's foreign conduct was intended to cause, and did cause, substantial effects in the United States. BATCo was a founding member of ICOSI—a joint organization used, in the words of an internal BATCo document, to "throw[] up a smoke screen and to throw doubt on smoking research findings which show smoke causes diseases." Pet. App. 1624a. BATCo also founded or participated in other joint entities and covert "operations" that petitioners used to further the goals of the enterprise in the

BATCo, the court's analysis conflicts with decisions of other courts of appeals that have held that domestic effects of foreign conduct are insufficient to establish RICO liability. For the reasons explained above, this case does not implicate that asserted conflict because BATCo's domestic conduct—and its conspiracy with the domestic cigarette manufacturers—provide independent grounds for liability, and that liability is not extraterritorial under the test used by any court of appeals.

In any event, BATCo's suggestion of a conflict is incorrect. BATCo's argument rests in part (Pet. 12, 20, 30) on several decisions addressing the extraterritorial effect of various statutes other than RICO. As BATCo admits (Pet. 34), however, "RICO is quite different" from those statutes, and therefore those decisions shed little light on whether, or under what circumstances, Congress intended RICO to apply to conduct abroad that has substantial effects in the United States.

As to the few cases that did involve RICO, all of them arose from the very different context of private actions under Section 1964(c), which allows a plaintiff to recover damages caused "by reason of" a RICO violation. The "by reason of" language requires the plaintiff to prove

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United States. See, *e.g.*, *id.* at 1620a ("Operation Berkshire"); *id.* at 1627a (INFOTAB); *id.* at 1634a-1635a ("Operation Downunder"); *id.* at 1660a (International ETS Management Committee); *id.* at 1693a (Association for Research on Indoor Air); *id.* at 1695a-1696a (IAI). BATCo collaborated with other petitioners to craft and enforce a unified message on matters of smoking and health, with a particular eye toward the consequences in the United States. See *id.* at 300a, 302a-303a, 305a, 307a-308a, 311a-315a, 317a, 319a, 343a, 570a-571a, 1620a, 1625a-1626a. Thus, the TI praised INFOTAB, of which BATCo was a founding member, as critical in protecting the industry's position in the United States from the "powerful[]" "back-wash" of anti-smoking developments in other countries. *Id.* at 343a (citation omitted); *id.* at 60a.

that the RICO violation was the proximate cause of injury to the plaintiff's business or property. See *Bridge*, 128 S. Ct. at 2141. In one case cited by BATCo, the Ninth Circuit held that RICO did not reach the defendants' overseas conduct because there was no evidence that it had "'directly caused' loss or injury in the United States" to any of the plaintiffs' businesses or property. *Doe I* v. *Unocal Corp.*, 395 F.3d 932, 961-962 (2002), vacated, 395 F.3d 978 (2003). In another, the Eleventh Circuit held that RICO did not reach the defendant's foreign conduct under the "effects" test because "[n]o United States person or business [was] harmed by this scheme," although the court went on to hold that liability could be based on the "[s]ignificant amounts of conduct" that took place in the United States. *Liquidation Comm'n of Banco Intercontinental* v. *Renta*, 530 F.3d 1339, 1352 (2008).[20]

Unlike the cases cited by BATCo, this case involves a suit by the United States under Section 1964(a) "to prevent and restrain" RICO violations. See 18 U.S.C. 1964(b) (authorizing the Attorney General to bring such proceedings). It does not require that the violation have proximately caused injury, or even that it have caused any injury at all. Moreover, a mail or wire fraud violation may occur whether or not the scheme to defraud succeeded in harming any intended victim. See *Bridge*, 128 S. Ct. at 2137-2141; *Durland* v. *United States*, 161 U.S. 306, 315 (1896). Thus, principles of causation articulated in Section 1964(c) cases are not applicable to

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[20] BATCo also relies (Pet. 17-18) on *North South Finance Corp.* v. *Al-Turki*, 100 F.3d 1046 (2d Cir. 1996), but, as it acknowledges (Pet. 18), the court in that case expressly declined to consider whether a civil RICO damages action may be based on foreign conduct with substantial effects in the United States. See *North S. Fin. Corp.*, 100 F.3d at 1052.

cases arising under Section 1964(a). BATCo does not argue that there is any circuit conflict on the proper standard for the application of RICO in the context of Section 1964(a) to conduct abroad, and in light of the extensive evidence of BATCo's domestic conduct, this case presents no occasion for addressing that issue. Moreover, because the conduct at issue here had "a substantial, direct, and foreseeable effect within the United States," Pet. App. 59a, BATCo has not shown that any other court of appeals would have decided this case differently even under the standards applicable to Section 1964(c).

H. The Court of Appeals Correctly Concluded That Altria Acted With Intent To Defraud

Altria contends that there was insufficient evidence to show that its executives acted with intent to defraud. That fact-intensive question, which was resolved against Altria by both lower courts, see Pet. App. 55a-57a; *id.* at 2005a-2007a, does not warrant this Court's review. In any event, the evidence established that Altria's executives were active participants in the enterprise.

For example, Altria directed and funded CTR "special projects," which were research projects on topics selected by petitioners' lawyers and designed to generate ostensibly independent results that were used to support petitioners' false public statements. Pet. App. 7a; see, *e.g.*, *id.* at 258a (letter from Altria vice-president transmitting check to cover Altria's contribution to CTR special project); *id.* at 356a; see generally *id.* at 9a, 240a-258a. Altria executives participated in meetings of the TI's board of directors and its Executive Committee, which had final approval authority on all TI matters. *Id.* at 183a-184a, 350a. Altria participated on TI's Commit-

tee of Counsel and hosted several meetings of that committee at its corporate headquarters in New York. *Id.* at 210a-211a. Altria organized and hosted petitioners' "Operation Downunder" conference, where petitioners devised their strategy for denying the health risks posed by second-hand smoke. *Id.* at 1629a-1635a. And Altria issued a joint statement on behalf of petitioners denying the addictiveness of nicotine. *Id.* at 634a.

Altria does not address the many findings by the district court demonstrating its active participation in the enterprise. Instead, it contends that there was no proof that its mailings were sent with intent to defraud. 09-979 Pet. (Altria Pet.) 3-7. As the court of appeals explained, this objection misunderstands the governing law. "Nothing in the mail fraud statute requires a mailing to be fraudulent at all, as long as the mailing is in furtherance of a fraudulent scheme." Pet. App. 56a; see *Bridge*, 128 S. Ct. at 2138. In light of the factual findings establishing Altria's participation in the enterprise, the district court did not clearly err in further finding that Altria's executives acted with specific intent to defraud. Pet. App. 57a. Altria joined the scheme to defraud; its executives acted with specific intent in doing so; and Altria's lawyers used the mails to further that scheme.[21] No more was required to establish Altria's liability for mail fraud.

Altria also fails to challenge the district court's additional conclusion that Altria violated RICO's conspiracy

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[21] Although Altria stresses (Pet. 3) that the mailings were all cease-and-desist letters written by in-house counsel, there is no question that they were in furtherance of petitioners' scheme to defraud. Altria sent the letters to suppress publication of data that would have revealed petitioners' intimate internal understanding of the physiological effects of nicotine. See Pet. App. 680a-681a.

provision. See Pet. App. 57a. "The district court's findings of fact regarding Altria's actions in furtherance of the goals of the enterprise[,] * * * as well as the voluminous findings of concerted action and explicit agreement by [petitioners], amply support the circumstantial inference that Altria conspired with the other [petitioners] to violate RICO." *Ibid*; see *Salinas*, 522 U.S. at 66 (finding RICO conspiracy where defendant "knew about and agreed to facilitate the scheme"). Altria's liability for the RICO conspiracy provides an independent basis for subjecting Altria to the remedial order. See *id.* at 63-64 (each member of RICO conspiracy "is responsible for the acts of each other" (citing *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946)).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5267

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
AND TOBACCO-FREE KIDS ACTION FUND, ET AL.,
INTERVENORS

v.

PHILIP MORRIS USA, INC. F/K/A PHILIP MORRIS, INC.,
ET AL., DEFENDANTS-APPELLANTS

Tues. Oct. 14, 2008

APPEARANCES:

ON BEHALF OF THE APPELLANTS:
MICHAEL A. CARVIN, ESQ.
MIGUEL A. ESTRADA, ESQ.

ON BEHALF OF THE APPELLEES:
MARK B. STERN, ESQ. (DOJ)

ON BEHALF OF THE INTERVENORS:
HOWARD C. CRYSTAL, ESQ.

Before: Chief Judge SENTELLE and Circuit Judges TATEL and BROWN

ORAL ARGUMENT OF MIGUEL A. ESTRADA, ESQ. ON BEHALF OF THE APPELLANT

MR. ESTRADA: Thank you, Your Honor. And may it please the Court. My name is Miguel Estrada. I'm counsel for Philip Morris USA, and I, and I will speak on behalf of all defendants to the lights issue, the future violations issue, and the remedies issue.

Let me start with the lights. The government's position in this case is that it is perfectly lawful for the [26] defendants to tell a consumer that a pack of cigarettes has per cigarette 16 milligrams of tar under the FTC measure, and that another pack has 11 milligrams of tar, but that it is criminal fraud to tell the consumer that 11 is lower than 16. To call this position incomprehensible, as Judge Alito did in the argument last week, doesn't quite do it justice. It is now the case, and it has never been the case, that the use of descriptors is fraudulent or even false because they correctly characterize the outcomes of the FTC-authorized tests since 1966.

Now the government's theory in the case, and which Judge Kessler accepted, is entirely this. This would not be fraud. This would not be false but for compensation. Because of the fact that a consumer may puff more deeply or smoke more cigarettes, this has now become fraud. Now this was—

JUDGE TATEL: Well isn't her, isn't her reason for that that the, that the companies knew that? When, in other words, when they said, when they say that it's a low-tar cigarette, they knew, based on their own research, that in fact it wasn't because of compensatory smoking?

MR. ESTRADA: I did not hear the first part of the question.

JUDGE TATEL: Oh, I'm sorry. Is this better? My question was, didn't the, didn't the District court say that extractly, the phrase low-tar is not inaccurate, but that [27] based on the company's own research about compensatory smoking that they knew that in fact they weren't low-tar because of the way smokers compensate?

MR. ESTRADA: See but—

JUDGE TATEL: That's her theory, right?

MR. ESTRADA: Yes. And that's exactly right.

JUDGE TATEL: Yes.

MR. ESTRADA: At finding, I believe, 2068, she explains that the way consumers compensate is by puffing more deeply on the one hand or smoking more cigarettes.

JUDGE TATEL: Right. And the companies—

JUDGE SENTELLE: (Indiscernible.)

JUDGE TATEL: Yes, and the companies knew that based on their own research.

MR. ESTRADA: Everybody knew it, Judge Tatel. That's, that's the problem.

JUDGE TATEL: Well but the point is, the point is in terms of whether it's fraudulent or not—

MR. ESTRADA: Well but—

JUDGE TATEL: —if the companies knew it—

MR. ESTRADA: --but on that, we can go to the record. I mean, on the one hand, just as a matter of law,

it is unreasonable to say that a consumer could think that, that he would get the prescribed amount solely on the basis of, of smoking more units of the product. And the fact is, in 1966, [28] and this is in the record, when the FTC was conducting hearings on this issue, the companies did tell the FTC that a smoker might be compelled to get his nicotine fix by smoking more, and that's Joint Exhibit 47, 48—

JUDGE TATEL: Right.

MR. ESTRADA: —at page 131. This was known in 1966. Now on whether consumers would puff more deeply, the issue has been sort of speak, ventilated ad nauseam in this courthouse. The *Brown & Williamson* litigation came here in 1983. You may recall that the whole issue in the litigation was compensation. And both the FTC, Judge Cazelle (phonetic sp.) and this Court were fully aware that compensation was going on and that there were two types of it. You could smoke more or take deeper puffs. And the FTC, Judge Cazelle and this Cou 't all said, it is irrelevant because everybody has known from 1966 that the point of the system is to tell the consumer how much tar they would get compared to another cigarette if they smoked the two cigarettes in the same way. It was never from the get-go any sort of a claim, by the agency mind you, that, that this was, that any of these numbers had any bearing on the amount of tar or nicotine that a, that a consumer would get.

JUDGE TATEL: Is there, is there a difference in your, is there a difference between, I, I think your point about low tar. Your point there is that low tar reflects the [29] actual numbers, right? Low tar identifies cigarettes that in fact have low tar, correct?

MR. ESTRADA: Yes.

JUDGE TATEL: But what about, what about the phrases like, like light? And I ask that because of the District court. The District court has this finding. She says, there are lights of certain brands with higher tar levels than regulars of other brands from the same company. And there are also lights and regulars of the same brand that have the same FTC tar rating. Now so what she's saying there is that these, that the labels, light, are being used inconsistently, that they don't always reflect low tar.

MR. ESTRADA: Well I think there—

JUDGE TATEL: Is that, by the way, you don't challenge that fact finding, do it?

MR. ESTRADA: We haven't challenged any fact—

JUDGE TATEL: Right.

MR. ESTRADA: —any fact finding, Judge Tatel.

JUDGE TATEL: Okay. So that, that's a fact finding—

MR. ESTRADA: (Indiscernible) arguments are purely legal.

JUDGE TATEL: Yes.

MR. ESTRADA: The key point about something like lights is that there is, that no consumer gets the same [30] message from hearing, lights.

JUDGE TATEL: No, but in terms of, you were saying that the labels accurately describe—

MR. ESTRADA: But they do, and that's the point—

JUDGE TATEL: —the level. Let me, let me just finish. You say the labels accurately describe the tar level in the cigarettes, but here, you have a finding that that's not the case, that they are inaccurate.

MR. ESTRADA: Well, no. Whether they are accurate or inaccurate I would think is a legal conclusion. But in fact, the finding is—

JUDGE TATEL: Well let me go back. I thought you said they're just, they're, they're just true. They are literally true.

MR. ESTRADA: They are true.

JUDGE TATEL: That's your argument.

MR. ESTRADA: They're literally true. They're actually true.

JUDGE TATEL: But, but here, here you have a finding. Here you have a finding that you haven't challenged which suggests that's not the case.

MR. ESTRADA: Well because what, what is going on with lights as opposed to low tars, that lights are a particular kind of low-tar cigarette. And what lights do accurately describe is that they are, that they have lower tar [31] than the regular pack of the small brand, and also have, have also the meaning that—

JUDGE TATEL: Well actually, that's inconsistent with this finding.

MR. ESTRADA: I don't believe so, because I don't believe she was making any findings as between brands. But in any event, it also conveys a taste message. And of course, look, we have a large, a dispute in the District court on the question of whether, whether the defen-

dants intended a health message or a taste message. Our position is that we intended a taste message. * * *

* * * * *

[118]

ORAL ARGUMENT OF MIGUEL A. ESTRADA, ESQ.
ON BEHALF OF THE APPELLANT

MR. ESTRADA: Thank you, Your Honor. I have some quick points.

I don't want to be misquoted as having said that I agree with the fact findings of the district court. What I said is, we're bringing legal challenges to the court. Obviously, we disagree with a lot of what Judge Kessler had to say, and just because she calls something a finding also does not make it a finding. As you know, the Supreme Court said in *Pullman Standard v. Swint*, you have (indiscernible) of law and fact, and if you have made a legal error in your approach to the facts, you know, the judgment may be set aside on that basis.

Frankly, after you get a trial in which 60 years of your conduct out on trial, and an appeal in which even with [119] more pages, you cannot possibly address all of that. It is the only thing that we could do to sort of bring the, the unfairness and the injustice of the whole, of the whole process in front of the court, and to highlight that this is the type of case that was tried purportedly under a federal criminal trial under circumstances that never would have been permitted if it were a criminal trial.

* * * * *

Supreme Court, U.S.
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No. 09-980

IN THE

Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

The government's brief in opposition is largely an effort to change the subject. It does not attempt to defend the D.C. Circuit's flawed understanding of the presumption against extraterritoriality or its application of a watered-down "effects" test to RICO. Instead, it mainly urges two alternative but meritless grounds for affirmance, neither of which was properly preserved below. The government also disputes a factual premise accepted by both courts below: that BATCo's "'activities and statements'" for which RICO liability was imposed here "'took place outside of the United States.'" App. 57a-58a (quoting App. 1932a). The government tries to explain away the various circuit conflicts documented in the petition and the five supporting *amicus* briefs, but its efforts fail. This Court's review is warranted.

1. *The Government's Alternative Grounds for Affirmance.* Unable to defend the D.C. Circuit's flawed reasoning, the government instead attempts to justify the result on grounds unmentioned by either of the lower courts. These arguments fail for three reasons. First, they were not properly preserved. Second, they are meritless and thus provide no basis for avoiding the certworthy issues presented in BATCo's petition. Third, even assuming preservation and merit, they make the petition *more* certworthy, not less.

a. *The "conspiracy" theory of extraterritoriality.* The government notes that (i) BATCo was found liable for conspiracy under 18 U.S.C. § 1964(d); (ii) under the substantive liability rules governing conspiracies, a conspirator "is liable for the acts of its co-conspirators undertaken in furtherance of the con-

spiracy"; and (iii) "there is no dispute that the conduct of BATCo's co-conspirators occurred in the United States." Opp. 66-67. The government argues that the domestic conduct of BATCo's co-conspirators is therefore properly attributed to BATCo for purposes of evaluating whether RICO is being applied extraterritorially in this case to BATCo.

The government faults BATCo for failing to "address" this issue (Opp. 67), but neglects to mention why: The government never made this argument in either the D.C. Circuit or the district court. See U.S. C.A. Br. 175-80 (2008 WL 2682546, at *176-81); Reply Memorandum In Support of Post-Trial Brief of the United States ("U.S. D.C. Reply Memo"), at 44-45 (D.D.C. Sept. 19, 2005) (arguing only that "*BATCo's extraterritorial actions* have a direct effect on the United States") (emphasis added); *ibid.* ("[T]he evidence adduced at trial demonstrates that *BATCo's actions* to suppress information and research *around the world* * * * have had * * * an impact * * * in the United States.") (emphasis added).[1] This Court has consistently refused to consider points never pre-

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[1] The government was responding to two BATCo submissions. The Joint Defendants' Proposed Findings of Fact: Chapter Twelve, at 148-56 & n.32 (D.D.C. Aug. 15, 2005), explained that BATCo does not conduct any business or research or make any public statements in the United States, and that its foreign activities were "not intended to, and do not have, any direct or substantial effects on the American public." The Corrected Post-Trial Brief of Joint Defendants, at 125-34 (D.D.C. Sept. 7, 2005 corrected on Sept. 13, 2005), reiterated these arguments and contended that it would be "speculative to find that any of *BATCo's* past or future extraterritorial conduct had a direct and substantial effect on the U.S. public because this record is simply devoid of any evidence of such effect."

sented in the courts below. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *Glover* v. *United States*, 531 U.S. 198, 205 (2001). See generally E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 6.26(c), at 465 (9th ed. 2007). The government thus cannot invoke its conspiracy argument as an alternative ground for affirmance in this Court.

The argument is also meritless. Tellingly, the government cites no authority holding that a conspirator's domestic conduct may be attributed to a foreign co-conspirator for purposes of determining whether RICO is being applied extraterritorially.[2] That theory would allow plaintiffs to circumvent the territorial limits on legislation merely by adding a conspiracy claim, thus rendering the presumption against extraterritoriality a dead letter. There is no evidence that Congress intended to allow such attribution when it enacted RICO. And this Court has rejected as "frivolous" a similar argument regarding the venue provisions of the antitrust laws on which RICO was modeled. See *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 380, 384 (1953) (rejecting argument that Georgia insurance commissioner was "found or has an agent" in Florida because his co-conspirators were located there).

Relying on *Bankers Life*, many courts have similarly rejected the so-called "conspiracy" theory of personal jurisdiction (whereby the forum contacts of one

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[2] *Ford* v. *United States*, 273 U.S. 593 (1927) (Opp. 66-67) is inapposite. That case involved a treaty with Great Britain that expressly reached beyond the United States' territorial jurisdiction. See 273 U.S. at 607-09.

conspirator are attributed to other co-conspirators for purposes of establishing "minimum contacts"). See, *e.g.*, *National Industrial Sand Association* v. *Gibson*, 897 S.W.2d 769, 773 (Tex. 1995); *Hewitt* v. *Hewitt*, 896 P.2d 1312, 1316 (Wash. Ct. App. 1995); *Foley* v. *Marquez*, 2004 WL 603566, at *4 (N.D. Cal. Mar. 22, 2004). To the extent that confusion exists in the lower courts over the validity of that personal-jurisdiction theory, see Pet. for Cert., *Mackey* v. *Compass Marketing, Inc.*, No. 05-1433, at 9-18 (dismissed under Rule 46.1, see 548 U.S. 941 (2006)), the opportunity to address that confusion (even indirectly) would be yet another justification for further review.

b. *The argument based on BATCo's supposedly domestic conduct, including use of the U.S. mails.* Next, the government suggests that the lower courts had no reason to address the extraterritorial reach of RICO because BATCo's own conduct was not exclusively foreign. This argument also fails for multiple reasons.

To begin with, this argument challenges a factual premise plainly accepted by both courts below. As the D.C. Circuit noted, "the district court found that [BATCo's] 'activities and statements took place outside of the United States.'" App. 57a-58a (quoting App. 1932a). The district court also found – again contrary to the government's argument – that "many of BATCo's *Racketeering Acts* took place outside the United States." App. 1931a (emphasis added).[3] Ac-

[3] This Court typically refrains from "review[ing] concurrent findings of fact by two courts below." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). See generally E. GRESSMAN ET AL., *supra*, § 4.14, at 271.

cordingly, both decisions below rested exclusively on an "effects test" analysis of BATCo's foreign conduct. See App. 59a-60a, 1932a-33a.

There is an excellent explanation. The government *never argued* that the district court could or should avoid the question of extraterritoriality on the ground that BATCo had used the U.S. mails or purportedly engaged in the domestic conduct the government describes here (Opp. 65-66). As demonstrated above, the government effectively *invited* the district court to assume that *only* "extraterritorial actions" and "actions * * * around the world" by BATCo were at issue, and strenuously argued that those foreign activities satisfied the "effects" test. See U.S. D.C. Reply Memo, at 44-45. Although the government advanced its alternative argument *in the D.C. Circuit*, by then it was too late, as BATCo pointed out. See BATCo C.A. Reply Br. 8, 10 (2008 WL 2682540, at *8-9) (objecting to "new-found domestic conduct argument" which government "never argued" below). The D.C. Circuit accordingly never reached this argument, and it is not properly before this Court.

In any event, the argument is wrong. The government relies primarily on the eleven pre-1984 instances of BATCo's use of the U.S. mails or wires, which served as BATCo's predicate acts under RICO. See Pet. 5 n.4. As the district court correctly found, however, those counts involved conduct that "took place outside the United States" (App. 1931a) – the acts of sending or receiving letters or wires *in England*. The government errs further in its reliance (Opp. 63-64) on *Pasquantino* v. *United States*, 544 U.S. 349 (2005), which held that the presumption

against extraterritoriality was inapplicable *not* because U.S. wires *were used*, but because the defendants had "executed" a wrongful scheme "inside the United States." That scheme included, among other things, using *interstate* phone calls placed from New York to order liquor from package stores in Maryland and employing persons to drive the liquor from Maryland into Canada without paying customs taxes. *Id.* at 353. It was this substantial "domestic element" of the defendants' conduct that made it unnecessary, in the majority's view, to address the extraterritoriality issue.[4]

Moreover, RICO punishes a defendant's conduct or participation in the enterprise's racketeering activity. See *United States* v. *Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999). For that reason, several Circuits have held that RICO "predicate acts" of U.S. mail or wire fraud are insufficient to overcome the presumption against extraterritoriality when (as here) they are "merely preparatory" or "peripheral" to fraudulent foreign conduct. *Liquidation Comm'n of Banco Intercontinental, S.A.* v. *Renta*, 530 F.3d 1339, 1351-52 (11th Cir. 2008); *Butte Mining PLC* v. *Smith*, 76 F.3d 287, 291 (9th Cir. 1996); *North South Finance*

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[4] If mere use of U.S. wires converted a foreign scheme into domestic conduct, there would have been no need for the Court to have discussed the defendants' other extensive domestic conduct (544 U.S. at 362, 365, 371-72), or the four dissenters to have analyzed Congress's lack of intent to extend the wire fraud statute to extraterritorial schemes (*id.* at 372-80). To the extent the government's alternative argument for affirmance based on *Pasquantino* would allow this Court to resolve the important extraterritoriality issue left open in that case, that would be a further reason to grant review. See also Int'l Ass'n of Defense Counsel *Amicus* Brief ("IADC Br."), at 8-9.

Corp. v. *Al-Turki*, 100 F.3d 1046, 1052-53 (2d Cir. 1996). BATCo's alleged predicate acts of mail and wire fraud consisted of sending cover letters enclosing materials for publication in the U.K. and an agenda for foreign research conferences, and receiving comments from Brown & Williamson (B&W) about the same. App. 2127a-28a, 2136a, 2143a-49a, 2164a-65a. At most, these communications were "preparatory" or "peripheral" to BATCo's foreign conduct.[5]

2. *The Conflicts and Confusion in the Lower Courts.* The petition and supporting *amicus* briefs document a number of circuit conflicts, including:

(i) disagreement between the Ninth and D.C. Circuits over the meaning of the presumption against extraterritoriality and the definition of "extraterritorial" (Pet. 11-15);

(ii) conflict and confusion in the lower courts over the extraterritorial reach, if any, of RICO, and how that reach is measured (Pet. 17-22);

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[5] The government's new-found domestic conduct argument (Opp. 67-68) also rests on a distorted view of the record. Among other things, BATCo never owned or operated an "experimental tobacco farm in North Carolina." *Id.* at 66. "Y-1" tobacco was developed "[a]t [a *B&W*] experimental farm in North Carolina," not by BATCo. App. 788 (¶1549); see also C.A. JA 9050-52 (testimony that B&W developed Y-1). Neither did the district court find that BATCo ever promoted or marketed cigarettes in the United States. Opp. 66. BATCo sells its cigarettes to R.J. Reynolds in the U.K. for resale by R.J. Reynolds' affiliate, Lane Limited, in the United States. C.A. JA 8231, 8445, 9120. BATCo has never had more than a *de minimis* share of the U.S. market, estimated most recently as 0.02%. C.A. JA 1162. Although space will not permit a complete refutation of this factual sideshow, BATCo answered it in the D.C. Circuit. See Pet. C.A. Reply Br. 8-10 (2008 WL 2682540, at *8-9).

(iii) conflict over the meaning of the "effects" test (Pet. 22-28 & n.10; IADC Br. 10-16; Law Professors' *Amicus* Brief ("Professors' Br."), at 10-11 (identifying "three different analyses" used by the Ninth, Fifth, and Second Circuits));

(iv) conflict over the adequacy of the "effects" test alone to measure extraterritoriality, without also considering such factors as international comity (Pet. 20; Professors' Br. 7-8 (citing cases from First, Third, Fifth, and Seventh Circuits that "have included foreign comity concerns as part of the effects test")); and

(v) conflict over the meaning of *United States* v. *Bowman*, 260 U.S. 94 (1922), which (as the government does not deny) is directly implicated in the split over RICO's extraterritorial reach (IADC Br. 6-8; Professors' Br. 11-12).

These conflicts are widely recognized. See Pet. 12, 14-15; IADC Br. 6-8; Professors' Br. 3-4, 6-9, 10-11. See also C. BRADLEY & J. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS, at 706 (3d ed. 2009) (noting confusion in lower courts over when to "invoke the presumption against extraterritoriality"; citing conflict between the D.C. Circuit and *Subafilms, Ltd.* v. *MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (en banc)).

The government's attempts to downplay these conflicts are wholly unpersuasive. The government first explains that our conflicts argument "rests in part (Pet. 12, 20, 30) on several decisions addressing the extraterritorial effect of various statutes other than RICO." Opp. 68. That is irrelevant. Four of the five conflicts listed above involve *legal doctrines that*

are not RICO-specific. See Pet. 22-24 & n.10, 30. That *Subafilms*, for example, involved the Copyright Act does not render the Ninth Circuit's understanding of the presumption against extraterritoriality any less inconsistent with the D.C. Circuit's understanding. The same is true of the vastly different versions of the "effects" test used by other circuits in cases involving statutes other than RICO. Consistency in the rule of law is imperiled if courts apply contradictory *approaches* to statutory interpretation and different versions of the same legal test.

Equally unavailing is the government's attempt (Opp. 63, 68-70) to distinguish the conflicting cases involving the extraterritorial reach (if any) of RICO, which is the only RICO-specific conflict we identify. Pet. 17-22. According to the government, there is a crucial distinction between cases brought under 18 U.S.C. § 1964(c) and those (such as this case) brought under 18 U.S.C. § 1964(a). The former subsection authorizes actions for treble damages and attorneys' fees by "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." The latter has no such standing requirement and authorizes suits only by the U.S. government for equitable relief to "prevent and restrain violations of section 1962 of this chapter."

That distinction in no way diminishes the conflicts and confusion regarding RICO's extraterritorial reach. Both types of RICO actions require a "violation of section 1962," which sets forth RICO's "prohibited activities." As this Court explained in *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248-56 (1991), the scope of a statute's substantive provisions provides telling evidence of Congress's intent (or lack thereof)

to regulate extraterritorially, and Section 1964(a) and 1964(c) actions are virtually identical in their substantive provisions.[6] The same is true of the other substantial evidence in RICO's text, structure, and legislative history suggesting that Congress *never* intended RICO to extend beyond the nation's borders. See Pet. 16-17, 19, 29-30 & nn.6-7 (discussing service-of-process provision, Congress's declaration of its exclusively domestic purpose, etc.); see also IADC Br. 21-24 & n.9 (reviewing legislative history); Professors' Br. 19-21. That evidence applies with equal force to *both* remedy provisions. With respect to both provisions, "Congress failed to provide any mechanisms for overseas enforcement" of RICO and failed to "address[] the subject of conflicts with foreign laws and procedures." *Aramco*, 499 U.S. at 256.

Nor is there reason to believe that Congress intended to differentiate between the *extraterritorial* reach of the same substantive provisions of RICO when invoked in different types of civil actions under Section 1964. The government's argument assumes that the injury to "business or property" required to show standing must occur in the United States. But the statute does not say that, and that admittedly sensible result follows only if one gives proper weight to the presumption against extraterritoriality, which the D.C. Circuit refused to do here. The requirement of injury to "business or property" is nothing more than a standing requirement borrowed from the antitrust laws as a prudent limitation on private rights of action for treble damages under RICO.

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[6] The only difference is expressly stated in Section 1964(c), which excludes the use of securities-fraud counts as predicate acts. See Pet. App. 4a.

3. *The Important and Recurring Nature of the Issues Presented.* The government does not dispute our showing (Pet. 28-31) that the two issues raised by BATCo's petition are nationally important and recurring. Their significance, moreover, is underscored by the broad *amicus* support from organizations representing business and legal professionals as well as by legal academics. See, *e.g.*, U.S. Chamber Br. 23 (issues of "obvious" and "vital[]" importance to "American business" and to "foreign actors and international comity"); U.K. Int'l Chamber Br. 2, 15-16 ("critically important" issues); KBR Br. 3-4, 5-11 (discussing "critical importance of the presumption against extraterritoriality in an era of globalization"); *id.* at 2, 13-18 (discussing severe burdens RICO's extraterritorial extension imposes on global business and federal courts).

4. *The Merits and the Additional Arguments for Review Raised by* Amici. Strikingly, the government makes no genuine effort to defend the D.C. Circuit's reasoning concerning the presumption against extraterritoriality, to reconcile that reasoning with this Court's decisions, or to explain why BATCo's foreign conduct satisfies the "effects" test. See Pet. 13-14, 24-27, 31-35. The most the government does is quote the D.C. Circuit's holdings and assert they are correct. See Opp. 67, 70. It tellingly makes no attempt to explain how extraterritorial application of RICO could possibly be reconciled with the substantial evidence in RICO's text, structure, and legislative history that Congress intended the statute *not* to apply extraterritorially. See page 10, *supra*. It also says not one word in defense of the questionable application of the "effects" test to RICO. See Pet. 32-34. Finally, the government ignores the many additional persuasive

reasons for review identified by the *amici*. See, *e.g.*, Professors' Br. 14-15, 19-21, 23; IADC Br. 6-9, 16-19, 23-24 & nn.7-9; KBR Br. 8-11, 13-18; U.K. Int'l Chamber Br. 8-14.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

PHILIP MORRIS USA INC., FKA PHILIP MORRIS, INC.,
PETITIONER,

v.

UNITED STATES, ET AL.,
RESPONDENTS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of all sizes and in all industries.[1] The Chamber advocates issues of vital concern to the nation's business community and has frequently participated as *amicus curiae* before this Court and the federal courts of appeals, including in cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO") and First Amendment protections for corporate speech. And when misguided decisions of lower courts threaten the interests of the business community and the greater public, the Chamber has supported petitions for this Court's review. This is such a case.

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy the wrongdoing prohibited by the statute. At the same time, the Chamber is concerned that, in this case and broadly throughout the lower courts, the statute is regularly being misused against legitimate

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. Letters of consent from the appropriate counsel who have not previously filed blanket letters of consent have been submitted to the Clerk concurrently with this filing.

businesses. Here, having failed to persuade the courts that the Food and Drug Administration ("FDA") already had the authority to regulate the marketing of tobacco products, and then failed to persuade Congress to provide the FDA that authority, the Clinton administration set out in 1999 to persuade a solitary district court judge to impose the same regulatory scheme by judicial fiat through a nationwide RICO injunction. That gambit should have failed. But at the government's behest, the courts below combined a breathtakingly expansive view of the reach of RICO and a uniquely crabbed view of the First Amendment to justify restrictions on core speech that Congress never intended.

The court of appeals' holding that an entire industry can be labeled a RICO "enterprise" based on corporate competitors' informal coordination on public relations matters exemplifies the lower courts' massive expansion of potential RICO exposure for lawful businesses—converting a statute designed to deter mobsters from victimizing legitimate businesses into a tool for plaintiffs and their lawyers to do the same. This case presents the Court with an appropriate vehicle to stop—and roll back—this unjustified expansion of the RICO statute.

RICO defines an enterprise to include "any individual, partnership, corporation, association, or other legal entity, and *any group of individuals associated in fact although not a legal entity*." 18 U.S.C. § 1961(4) (emphasis added). As the United States has expressly conceded, and the court of appeals impliedly accepted, a corporation is not an "individual" under § 1961(4). The plain text of the statutory definition thus excludes corporations as constituents of

association-in-fact RICO enterprises, and that reading is confirmed by the well-established purpose of the statute.

The courts of appeals nonetheless have uniformly reached the contrary—and profoundly wrong—conclusion on this threshold question of statutory construction. Several members of this Court acknowledged as much when this issue was presented at oral argument in 2007 in *Mohawk Industries, Inc. v. Williams*, No. 05-465. Yet, the courts of appeals will not reconsider this fundamental issue absent this Court's intervention, and some courts are now interpreting this Court's *dicta* in *Boyle v. United States*, 129 S. Ct. 2237, 2243 n.2 (2009), as tacit approval of their position. The Court should seize this opportunity to correct their error.

This case also presents First Amendment issues of great importance to the business community. By imposing RICO liability on corporations for speech made to influence public opinion and affect government policies, this decision threatens to hamstring the ability of American companies to participate freely in public debates on matters critical to their businesses, their employees, and the U.S. economy. And that danger to free expression was exacerbated by the court of appeals' refusal independently to review the record supporting the district court's finding that the speech was knowingly false, and therefore subject to censure. As this Court has repeatedly recognized, the right to free expression is too precious to leave findings of constitutional fact that delineate the boundaries between protected and unprotected speech to the discretion of a single trial judge.

The D.C. Circuit's decision to shelve the presumption against extraterritoriality and apply RICO to the overseas conduct of a foreign company (British American Tobacco (Investments) Limited ("BATCo")) that had no direct or substantial domestic effects is also of great concern to the Chamber and its members. If not corrected by this Court, that holding threatens to bring virtually all foreign business torts within the potential ambit of U.S. law, and the court of appeals' striking disregard for international comity will invite harmful retaliation by other nations against American companies.

Because the D.C. Circuit's decision has far-reaching and disastrous implications for countless businesses, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.[2]

ARGUMENT

I. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A CORPORATION CAN BE A CONSTITUENT OF A RICO ASSOCIATION-IN-FACT ENTERPRISE

The D.C. Circuit's holding that a RICO "enterprise" may comprise corporations associated in

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[2] Although this brief focuses on certain issues critical to the Chamber and its members, the Chamber also supports the other grounds for review advanced by the industry petitioners—Philip Morris USA Inc. fka Philip Morris, Inc., R.J. Reynolds Tobacco Company, et al., Altria Group, Inc., British American Tobacco (Investments) Limited, and Lorillard Tobacco Co.—in their petitions for certiorari.

fact, though consistent with the views of other courts of appeals, conflicts flatly with the plain text and clear purpose of the statute. The lower courts' common error on this threshold issue frustrates the operations of legitimate businesses by exposing them to the threat of industry-wide injunctions, treble damages and unwarranted reputational injury for what amount to allegations of ordinary business torts. This Court should grant review to stop the prosecution of legitimate businesses under the pervasive misinterpretation of a statute enacted to combat gangsters and organized crime.

1. The district court ruled that the industry petitioners violated RICO by participating in the affairs of a joint "enterprise" through acts of wire and mail fraud. Pet. App. 1921a. The court of appeals affirmed. Relying on its prior decision in *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 821 (1988), it held that, because RICO "'defines "enterprise" as *including* the various entities specified,'" the statutory list of qualifying entities "'is not meant to be exhaustive,'" and therefore "a group of individuals, corporations, and partnerships associated in fact can qualify as a RICO 'enterprise,' even though section 1961(4) nowhere expressly mentions this type of association." Pet. App. 18a-19a.

Under that reasoning, whenever corporations work together towards any goal, even informally, they create a RICO enterprise. And whenever a plaintiff can plead an associated pattern of racketeering activity, claims that ordinarily could only have been brought against a constituent corporation as, for example, mail or wire fraud actions, *see* 18 U.S.C. §§ 1341, 1343, are instantly transformed into civil

RICO claims—with the attendant potential for treble damages and attendant stigma, *see* 18 U.S.C. § 1964(c). That outcome "effectively eliminate[s] the enterprise element of RICO and drastically expand[s] federal jurisdiction over all business torts which involve use of the mails or telephones." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1152 (D.N.J. 1983), *aff'd in part, rev'd in part on other grounds*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). The plain text and clear purpose of the statute confirm that Congress never intended to "RICO-ize" such broad swaths of business conduct.

a. RICO's text makes clear that a corporation cannot be a constituent part of an association-in-fact enterprise. Section 1961(4) describes two distinct categories of associations that may qualify as RICO enterprises. *See United States v. Turkette*, 452 U.S. 576, 581-82 (1981). Although the first clause identifies both "individual[s]" and "corporation[s]" as qualifying legal entities, the second clause specifies only a "union or group of individuals" as an associated-in-fact entity. *See* 18 U.S.C. § 1961(4) (emphasis added). As the United States has conceded, a corporation cannot be a constituent part of a "'union or group of individuals.'" *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 6, *Mohawk Indus., Inc. v. Williams* (2006) (No. 05-465).

The United States was right to make that concession. As a matter of both common and standard statutory usage "corporations" are not "individuals." *See Webster's Third New International Dictionary of the English Language, Unabridged* 1152 (1971) ("individual" refers to "a single human being as contrasted with a social group or institution"); 1 U.S.C.

§ 1 (listing "corporation" and "individual" as distinct species of "person"); 18 U.S.C. § 1961(3) (defining "person" as "any individual *or* entity capable of holding a legal or beneficial interest in property") (emphasis added). Indeed, this distinction between "individual" and "corporation" is inherent in the definition of a RICO enterprise itself: If the term "individuals" in the definition's second clause encompassed corporations, there would have been no reason separately to identify both "individual" and "corporation" in the first clause. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 21 (2001) (reiterating the "'cardinal principle'" that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (citation omitted).

Although some courts of appeals have nonetheless held that a group of corporations can qualify as a "union or group of individuals associated in fact,"[3] the D.C. Circuit did not rest its decision on that plainly erroneous ground. The court reached the same ultimate conclusion, though, based on its view that, because RICO's definition of "enterprise" is introduced by "includes" rather than "means," its enumeration of different types of enterprises is not exhaustive. Pet. App. 26a. But that rationale is also inconsistent with the plain text of the statute.

To be sure, "includes" can be read to introduce either an illustrative or an exclusive list, depending on the statutory context. *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934). And this Court itself recently observed in *dicta* that Congress's use of "includes"

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[3] *See, e.g., United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995) (citing cases), *cert. denied*, 517 U.S. 1155 (1996).

rather than "means" to introduce § 1961(4) indicates that the enumeration of potential enterprises was not intended to be exhaustive. *Boyle*, 129 S. Ct. at 2243 n.2. If that *dicta* were correct, the D.C. Circuit's conclusion that the industry petitioners constituted an association-in-fact enterprise would still be wrong. As Justice Souter suggested during the oral argument in *Mohawk*, Congress's inclusion only of "union[s] or group[s] of individuals associated in fact" in § 1961(4)'s second clause, after having listed "partnership[s], corporation[s], association[s], or other legal entit[ies]" along with "individual[s]" in the first clause, indicates that viewed only individuals—and not corporations or other legal entities that are not natural persons—as potential constituent members of association-in-fact enterprises. Transcript of Oral Argument at 51, *Mohawk Indus., Inc. v. Williams*, (Apr. 26, 2006) (No. 05-465) [hereinafter "Transcript of Oral Argument"] (observing the "peculiarity of [the "enterprise"] definition in which, although it starts out with the word includes, then follows a ... listing, A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, *i.e.*, individuals, are included") (statement of Souter, J.). Even if groups of corporations could form an association-in-fact "enterprise," moreover, under the "ordinary meaning of the term"—something this Court did *not* address in *Boyle*, *see* 129 S. Ct. at 2243 n.2—labeling the entire tobacco industry an "enterprise" based on competitors' coordination on public relations efforts would be well beyond the pale.

The result in this case should therefore not turn on whether "includes" is used in § 1961(4) to connote exclusivity rather than illustration. But there is good

reason for the Court nonetheless to take the opportunity here to reexamine the *Boyle dicta*, because the answer to that question will matter in many cases and a full examination of the statutory context demonstrates that Congress intended its enumeration to be exclusive. *First*, unlike typical illustrative provisions in which "includes" introduces a single example or an "obviously" incomplete catalog, *e.g.*, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79 (2002), in § 1961(4) "includes" precedes a list of five distinct types of legal entity, a catch-all category of "other legal entit[ies]," and lastly a "union or group of individuals associated in fact although not a legal entity." That level of specificity, and the inclusion of a catch-all within the list, indicates that the enumeration is intended to be exhaustive. *See* Transcript of Oral Argument at 42 ("[I]f this is not an exhaustive list, the only thing that seems possibly to be omitted from the list is what's involved here, which is a group consisting of a corporation or other legal [entity] ... and natural persons.") (statement of Alito, J.).

Second, Congress's use of a catch-all category in the first clause of § 1961(4), and omission of a similar catch-all in the second clause, indicates that Congress drafted the second clause as the exhaustive, rather than an illustrative, definition of association-in-fact enterprise. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citation omitted) (alteration in original).

Third, Congress used "includes" to introduce statutory enumerations in three companion subsections of § 1961, *see* 18 U.S.C. §§ 1961(3), (9), (10), and in each of those three subsections "it is unquestionable" that the term introduces an exhaustive list. Transcript of Oral Argument at 48 (statement of Scalia, J.); *see* 18 U.S.C. § 1961(9) ("'documentary material' *includes* any book, paper, document, record, recording, *or other material*") (emphasis added); *id.* § 1961(3) ("'person' *includes* any individual or entity capable of holding a legal or beneficial interest in property") (emphasis added); *id.* § 1961(10) ("'Attorney General' *includes* the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter") (emphasis added). Absent an indication otherwise, it is well established that a word should be given the same meaning throughout a statute. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006).

Fourth, when Congress intended in RICO to introduce a merely illustrative list, it used "including, but not limited to" to make that clear. *See* 18 U.S.C. § 1964(a) (using phrase "including, but not limited to" to introduce an illustrative list of permissible injunctive orders). The absence of the same "but not limited to" phrase in § 1961(4) and the other provisions of § 1961 that use the term "including" to introduce definitional

lists confirms that Congress meant something different in those provisions. *See Russello*, 464 U.S. at 23.

The D.C. Circuit attempted to distinguish the use of "including, but not limited to" in § 1964(a) by suggesting that Congress may have thought it necessary to make express the illustrative nature of the specification in that provision because, unlike § 1961, § 1964(a) lacks the "juxtaposition of the non-exhaustive term 'includes' with the exhaustive term 'means.'" Pet. App. 27a. That rationale is unpersuasive. If "includes" introduced merely illustrative listings in § 1961(4), that connotation surely would carry over to § 1964(a), which is "close enough" to share a common parlance. Transcript of Oral Argument at 43 (statement of Scalia, J.); *see, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) ("[A] term should be construed, if possible, to give it a consistent meaning throughout the Act.").

In any event, even if an illustrative interpretation were plausible, § 1961(4)'s breadth is "at least ambiguous," Transcript of Oral Argument at 47 (statement of Scalia, J.), and the rule of lenity thus requires the narrowest reasonable construction—that only groups of individuals, not other legal entities such as corporations, may constitute an association-in-fact enterprise. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (rule of lenity applies to statutes with both civil and criminal applications) (citing cases).

b. Reading § 1961(4) that way is also far more consistent with RICO's purposes. The legislative record makes clear that Congress intended through RICO "to seek the eradication of organized crime in the United States" and to counteract organized crime's infiltration and corruption of "legitimate business and

labor unions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923. Nothing in the legislative history suggests that Congress thought existing legal remedies were insufficient to address tortuous conduct by legitimate corporations, much less that Congress meant to provide the Executive freewheeling authority to regulate-by-injunction industries that are already subject to extensive legislative and administrative oversight or to provide plaintiffs and their lawyers a bludgeon to extract settlements from lawful businesses.

As Justice Alito has explained, RICO had "two aims": "to stop organized crime's infiltration of legitimate business" and "to make it unlawful for individuals to function as members of organized criminal groups." Samuel Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (Gary L. McDowell ed., 1989); *see also, e.g.*, Transcript of Oral Argument at 44 (statement of Breyer, J.) (noting that Congress may have "put in the word groups of individuals" because it "was worried about organized crime taking over the pizza parlor or taking over a trades union or taking over a similar kind of enterprise"). A plain language construction of § 1961(4) fully suffices to meet these goals.

By defining a RICO enterprise to include any "legal entity," the first clause ensures that the law reaches efforts of organized crime to infiltrate legitimate businesses or use pretextually legitimate businesses to mask criminal activity. And the second clause's specification of a "union or group of individuals associated in fact although not a legal entity" appropriately recognizes that organized crime often acts through a loose confederation or association of

individuals. But nothing in RICO's text, legislative history, or overriding purpose suggests that Congress was also concerned about confederations of *corporations* banding together. Counting informal corporate joint ventures as enterprises "would RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity .... Congress wouldn't have wanted to [do] that [as that had nothing] to do with organized crime ... [or] with taking over legitimate enterprises [by organized crime]." Transcript of Oral Argument at 44-45 (statement of Breyer, J.). Put another way, Congress "had something significantly different in mind." *Id.* at 36 (statement of Roberts, C.J.). RICO is not—and was never understood to be—necessary to prevent businesses from joining together in illegal activities. Such concerns are fully and adequately addressed by other laws, including statutes prohibiting criminal conspiracy, 18 U.S.C. § 371, and mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343.

RICO was intended to *protect* legitimate businesses, not to impose new and onerous burdens on them. Its legislative history portrays corporations as victims, not perpetrators, of organized crime. *See, e.g.*, 116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska) (Title IX was "designed to remove the influence of organized crime from legitimate business ... by removing its members from control of legitimate businesses"); S. Rep. No. 91-617, at 1 (1969) ("money and power" of organized crime "are increasingly used to infiltrate and corrupt legitimate business"). It is ironic that this statute, enacted as a shield to protect legitimate businesses from misuse, is being transformed by the lower courts into a weapon for

imposing arbitrary and onerous costs on such businesses.

2. The D.C. Circuit's misconstruction of RICO's "enterprise" definition, if left intact, will continue the long march of the courts of appeals to transform routine allegations of corporate misconduct into treble damages actions under RICO. If this trend continues, RICO will impose increasingly significant and unintended costs on American businesses. And nothing short of this Court's intervention will reverse this trend, particularly as lower courts are now interpreting this Court's *dicta* in *Boyle* as tacit approval of the status quo. If review is not granted, the government will be further emboldened to pursue regulation-by-injunction without the "hassle" of seeking congressional approval, and plaintiffs and their attorneys will be further emboldened to hound American businesses, even when those businesses are engaged in standard and lawful practices.

The ongoing "RICO-ization" of ordinary business torts imposes enormous costs on the national economy, even aside from its use here as a tool for imposing massive, unauthorized nationwide regulation. A RICO civil action in the hands of plaintiffs' lawyers is an "unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). In addition to potentially ruinous treble damages and the government's thus-far-unsuccessful efforts to secure massive retrospective disgorgement, businesses experience "an almost inevitable stigmatizing effect" when sued under a statute associated with racketeers and mobsters. *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990). Unsurprisingly these attributes

have made RICO a popular litigation tool of the plaintiffs' bar.[4] "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) (Marshall, J. dissenting). Designed to deter and root out organized crime, RICO's expanding scope now facilitates strike suits by plaintiffs and their lawyers to extract settlements from legitimate businesses.

In the Chambers' and its members' experience, the vast majority of civil RICO cases filed against corporations under the lower courts' misguided conception of a RICO "enterprise" have involved ordinary business torts. These suits do nothing to promote Congress's goals, and instead "apply RICO to new purposes that Congress never intended." *See Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). Yet because the courts of appeals have uniformly come out the wrong way on this issue, the abuse of the RICO statute against legitimate businesses will persist until the Court intervenes.

The Court should correct this fundamental error now. Several Members of the Court recognized the importance of this issue in 2007 during the oral

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[4] According to the Administrative Office of the U.S. Courts, 749 civil RICO actions were filed in federal court in the year ending March 31, 2009 alone. *See Federal Judicial Caseload Statistics*, Table C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2008 and 2009), *available at* http://www.uscourts.gov/caseload2009/tables/C02Mar09.pdf) (last visited Mar. 13, 2010).

argument in *Mohawk*, and this case presents the issue squarely. Given the enormous risks involved in defending RICO actions, moreover, most of these cases—including those involving meritless claims—settle. This case therefore presents the Court with a rare vehicle to resolve this vitally important issue.[5] The Chamber urges this Court to grant certiorari and restore the definition of a RICO association-in-fact enterprise to the one that Congress provided: a "group of *individuals* associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4) (emphasis added).

II. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A RICO ACTION MAY CONSTITUTIONALLY BE BASED ON STATEMENTS MADE TO INFLUENCE PUBLIC OPINION AND AFFECT GOVERNMENT POLICY

The D.C. Circuit stretched RICO far beyond its breaking point, and beyond the statute's constitutional scope, when it decided that the defendants could be held liable for statements overwhelmingly made to influence public sentiment and affect legislative and enforcement policy. Pet. App. 43a-46a. Indeed, "98.9% of the 'fraudulent' public statements identified by the district court"—addressing the health effects of smoking and secondhand smoke, the addictive nature of nicotine, and alleged manipulation of nicotine levels—"were not product advertisements, but op-ed

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[5] Notably, resolution of this issue would also resolve the deep circuit split over whether a corporation and its agents can constitute an enterprise distinct from the corporation itself. *See* Brief of Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner at 2-3, 18-19, *Mohawk Indus., Inc. v. Williams* (2007) (No. 06-873).

pieces, congressional testimony, and the like." Reynolds Pet. 16. Yet, the court of appeals held that *Noerr-Pennington* does not apply, and RICO and underlying federal anti-fraud statutes do apply, because the district court found the statements "clearly and deliberately false." Pet. App. 44a-45a. That holding is flatly inconsistent with the decisions of this Court and other courts of appeals, and if not reversed will substantially hinder the business community's ability to participate freely in public debate on matters central to the welfare of those businesses, their employees, and the U.S. economy.

Contrary to the D.C. Circuit's understanding, *Noerr-Pennington* applies foursquare to *all* speech made to influence public opinion towards the enactment or enforcement of law, regardless of whether the speech is true, false, or fraudulent. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, itself involved a third-party publicity campaign by railroads to advance legislation adverse to the trucking industry by use of "'deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information.'" 365 U.S. 127, 140 (1961) (quoting district court) (alteration in original). This Court nonetheless held that the railroads could not be held liable under the Sherman Act without infringing their constitutional right to petition the government. *Id.* at 137-41; *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988) ("A publicity campaign directed at the general public, seeking legislation or executive action, enjoys [statutory] immunity, even when the campaign employs unethical and deceptive methods.").

Other courts of appeals have likewise recognized that speech to influence public opinion and government policy is an essential feature of our political landscape, and that the truth or falsity (or even fraudulent nature) of statements made in that context are fodder for political combat, not suits at law. *See, e.g., Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000) ("Even *false* statements presented to support [petitions to the government] are protected."); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) ("While we do not condone misrepresentations, we trust that the council and agency, acting in the political sphere, can 'accommodate false statements and reveal their falsity.'") (citation omitted), *cert. denied*, 488 U.S. 965 (1988). Until now, the D.C. Circuit never suggested otherwise. Although the court cited its prior decision in *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), *see* Pet. App. 44a, *Abell* involved the government's historical ability to punish false statements made in adjudications and expressly distinguished *Noerr-Pennington* speech. *See* 48 F.3d at 1255 ("'Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.'") (citation omitted).

Review of this aspect of the court of appeals' decision is well warranted. Liability under RICO should not lie for views expressed in the course of and to affect public debate and government policy, such as industry petitioners' opinions about the then-uncertain health effects of secondhand smoke or arguments about semantic differences between "addiction" and "dependence." The expansion of RICO from the marketplace into the marketplace of ideas will chill businesses from participating fully in important public

debates, and cede the field to anti-business lobbies. Congress never so intended. As this Court recognized with respect to the Sherman Act, so too with RICO: "The proscriptions of the Act ... are not at all appropriate for application in the political arena." *Noerr*, 365 U.S. at 141.

III. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER INDEPENDENT APPELLATE REVIEW IS REQUIRED OF CONSTITUTIONAL FACTS THAT DISTINGUISH PROTECTED FROM UNPROTECTED SPEECH

The D.C. Circuit's holding that the First Amendment does not protect core political speech if it is "deliberately false [and] misleading," Pet. App. 44a, put dispositive constitutional weight on the district court's factual finding that the defendants' statements were "clearly and deliberately false," Pet. App. 45a (citing *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 146, 208-09, 309, 860, 864 (D.D.C. 2006)). Under *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984), the First Amendment rights at stake demanded independent appellate review of that crucial finding. Yet, even though the court of appeals acknowledged that it "may not have reached all the same conclusions as the district court," it reviewed the district court's findings "under the highly deferential clearly erroneous standard." Pet. App. 67a. That reinforced a persistent circuit conflict over the necessity for independent appellate review of constitutional facts. The issue is squarely presented in this case and it manifestly warrants this Court's attention.

In *Bose*, this Court addressed the appropriate standard of review of the finding of "actual malice" in a product disparagement case. The Court observed that in libel, fighting words, obscenity, and child pornography cases, it had "regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." 466 U.S. at 504-05; *see also id.* at 505-10 (discussing prior cases). The Court explained that independent appellate review was necessary because "[p]roviding triers of fact with a general description of the type of communications whose content is unworthy of protection has not, in and of itself, served sufficiently ... to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 505. It concluded that "[t]he requirement of independent appellate review ... is a rule of federal constitutional law." *Id.* at 510.

Since *Bose*, this Court has consistently adhered to that rule, including in cases involving commercial speech. In each case it has independently reviewed the facts critical to the determination whether the challenged speech is constitutionally protected. *See* Philip Morris Pet. 14-16. The Fifth, Tenth and Eleventh Circuits have followed suit. *See id.* at 16. Despite the clarity and consistency of this Court's direction, however, the D.C. Circuit believes "the implications of *Bose* are far from clear," *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 n.3 (D.C. Cir. 1985), and, along with the Fourth Circuit, it has refused independently to review constitutional facts that separate protected from unprotected commercial

speech. *See* Philip Morris Pet. 17. In this case, the D.C. Circuit, without discussion, extended that approach to noncommercial speech and reviewed the district court's finding that industry petitioners' speech was fraudulent, and thus unworthy of constitutional protection, only for clear error.

In *Bose*, this Court concluded that independent appellate review of constitutional facts is required in the First Amendment context because the "stakes" of free speech are simply "too great to entrust them finally to the judgment of the trier of fact." 466 U.S. at 501 n.17. This case exemplifies the danger of ignoring that teaching. Absent independent appellate review, a single judge's belief that industry petitioners crossed the line of permissible public advocacy will deprive their speech of all constitutional protection and permit sweeping restrictions on their rights to communicate freely on matters of public concern. This Court's intervention is necessary to prevent that from happening in this and future cases.

IV. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER RICO APPLIES TO EXTRATERRITORIAL CONDUCT OF FOREIGN CORPORATIONS THAT HAS NO DIRECT OR SUBSTANTIAL EFFECTS IN THE UNITED STATES

The D.C. Circuit's affirmance of the RICO judgment against BATCo also warrants this Court's review, on several grounds.

First, the D.C. Circuit refused to apply the established presumption against extraterritoriality. In direct conflict with this Court's decisions and those of other courts of appeals, *see* BATCo Pet. 12-13, the D.C. Circuit hewed to its idiosyncratic view that

"Congress's regulation of foreign conduct [with substantial domestic effects] is '*not* an *extraterritorial* assertion of jurisdiction.'" Pet. App. 58a (citation omitted). Thus, in the D.C. Circuit, the normal presumption is reversed: All federal laws apply to foreign conduct unless Congress expressly provides otherwise. Although other federal courts have taken differing views on *how* the presumption against extraterritoriality should be applied—a situation that itself warrants this Court's attention—the D.C. Circuit's view that the presumption effectively does not exist is flatly at odds with all of them, and irreconcilable with this Court's precedent, Congress's understanding, and traditional norms of international comity. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l L. 85, 88 (1998).

Second, when the D.C. Circuit considered whether RICO applies to the particular foreign conduct the district court found here, it adopted the effects test from the antitrust and securities contexts without any consideration whether that test captures what Congress actually had in mind in RICO. This Court did not formulate the effects test as a one-size-fits-all framework to determine the extraterritorial limits of all domestic laws, but instead determined that this test best effectuated Congress's specific intent under federal antitrust and securities laws. *See North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996).

Third, in affirming the district court's judgment against BATCo, the D.C. Circuit so diluted the effects test that it will routinely permit prosecution under RICO (and other federal laws) of wholly foreign conduct. Although the court recited that foreign

conduct must have "a substantial, direct, and foreseeable effect within the United States," Pet. App. 59a, it held sufficient foreign conduct with *at most* indirect and slight effects in this country. The district court did not find that BATCo made fraudulent statements to any U.S. consumer. The D.C. Circuit nonetheless affirmed BATCo's RICO liability based on (1) BATCo's provision to its U.S. subsidiary of "sensitive nicotine research" conducted abroad, which the U.S. subsidiary never shared with anyone else; (2) BATCo's "found[ation], fund[ing], and active[] participat[ion] in various *international* organizations, which [other] Defendants ... saw as instrumental to *their* efforts" in the U.S.; and (3) "the tremendous domestic effects of the fraud scheme generally." Pet App. 59a-60a (emphasis added). If those attenuated effects justify the application of RICO to overseas conduct, foreign business torts will regularly be within the ambit of U.S. law—at least so long as suit is brought within the D.C. Circuit.

Beyond their obvious importance to foreign actors and international comity, these issues are also vitally important to American business. If not corrected, the D.C. Circuit's unwarranted expansion of RICO's territorial scope will invite retaliation by other nations, to the detriment of U.S. businesses and the U.S. economy. *See* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 Vand. L. Rev. 1455, 1490-91 (2008). American companies' foreign operations will also suffer if they are forced to contend with inconsistent and overlapping regulation by U.S. authorities and the controlling law of their host jurisdictions. Certiorari is warranted to prevent that from happening.

CONCLUSION

The industry petitioners' petitions for *certiorari* should be granted, and the judgment should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae International Association of Defense Counsel ("IADC") is an organization of

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae* and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties received timely notice and consented to this filing.

corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. Since 1920, the IADC has been dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC regularly files briefs in pending cases throughout the United States on a variety of civil justice issues of broad application. Because the decision below erroneously sweeps a vast amount of foreign conduct within the jurisdiction of U.S. courts, and will subject legitimate foreign businesses to invasive discovery, wasteful litigation, and treble damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), IADC has a strong interest in its prompt review and reversal.

SUMMARY OF ARGUMENT

This case implicates several facets of extraterritoriality law that have caused significant confusion in the lower courts. Review by this Court thus would provide critical guidance on important and recurring issues that are of growing importance in an increasingly globalized world economy. The decision of the court below that the regulation of foreign conduct affecting the United States does not implicate the presumption against extraterritoriality conflicts with several decisions of this Court, which have made clear the presumption applies even when foreign conduct has domestic effects. Review also would permit the Court to resolve an acknowledged conflict in the lower courts over the meaning of this Court's decision in *United States v. Bowman*, 260 U.S. 94 (1922), a case involving prosecution of crimes on the high seas against the *United States government*,

which courts—including in cases involving RICO's extraterritorial reach—have widely misinterpreted to permit extraterritorial actions for harms done to private parties. It would also provide an opportunity to address questions that have been raised about whether boilerplate statutory references to "interstate or foreign commerce" suffice to overcome the presumption against extraterritoriality.

Long experience with the "effects" test in antitrust, trademark, and securities law, as well as in applying RICO itself, confirms it is inherently indeterminate, unpredictable, and fact-intensive, making it a deeply flawed means for determining the extraterritorial application of a statute as expansive as RICO. As this Court has recognized, such indeterminate tests promote wasteful litigation and create uncertainty that deters legitimate foreign businesses from engaging in activities that could subject them to suit here, thus inhibiting commerce.

A straightforward application of this Court's precedents clearly indicates that RICO does not apply extraterritorially. The statute is silent about extraterritorial application and some of its enforcement provisions affirmatively limit RICO to domestic use. The absence of even rudimentary provisions to accommodate RICO's application abroad confirms that Congress did not intend it to apply extraterritorially, and underscores the importance of requiring a clear indication Congress wishes a statute to be applied abroad, to ensure it has made the necessary legislative determinations to address potential conflicts with foreign nations. Such sensitive foreign-relations judgments should be made by Congress,

not by courts on an ad hoc basis. Finally, RICO's legislative history confirms that Congress intended it to address "the nationwide nature of the activity of organized crime." S. Rep. No. 91-617, at 161 (1969).

ARGUMENT

A. Review In This Case Would Permit The Court To Clarify Significant Areas Of Confusion In Extraterritoriality Law

There is significant confusion among the federal courts on the extraterritorial application of U.S. law. Because this case implicates several of the principal areas of confusion, it provides an excellent vehicle for furnishing the lower courts with sorely needed guidance on important and recurring questions in an area of the law that is of growing importance in an increasingly globalized world economy.

1. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)). While "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States," whether it "has in fact exercised that authority * * * is a matter of statutory construction." *Id.* The D.C. Circuit's decision below drastically departed from that basic understanding, concluding that "[b]ecause conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting th[e] 'effects' test is '*not* an *extraterritorial*

assertion of jurisdiction.'" App. 58 (quoting *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984)). Thus, the court held, "*the presumption against extraterritoriality does not apply.*" *Id.* (emphasis added). Review is warranted to correct that fundamental misunderstanding.

This Court has frequently noted that a jurisdiction may regulate conduct outside of its borders that has effects within it, but its decisions make clear that the presence of domestic effects does not eliminate the need for applying the presumption against extraterritoriality. In *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), for example, this Court held that the Lanham Act authorized relief for an American corporation against acts of trademark infringement by a U.S. citizen in Mexico. The Court began by reaffirming that "legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears," *id.* at 285, and that the determination whether Congress had "project[ed] the impact of its laws beyond the territorial boundaries of the United States * * * depends on construction" of the statute. *Id.* at 282-83. The Court then analyzed the statutory text and concluded that the infringing activities "fall within the jurisdictional scope of the Lanham Act." *Id.* at 283-85. Finally, the Court separately addressed the domestic effects of foreign conduct in rejecting the argument that relief would violate the holding of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), that "a violation of American law could not be grounded on a foreign nation's sovereign acts." That case was not implicated, the Court ex-

plained, because the defendant's "'own deliberate acts, here and elsewhere, . . . brought about forbidden results in the United States.'" 344 U.S. at 288 (quoting *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927)). The Court's analysis makes plain that the presence of domestic effects did not relieve it of the obligation of first ensuring Congress had authorized the statute to be applied extraterritorially, and that granting relief against the defendant's foreign conduct was deemed "extraterritorial" despite its domestic effects. *Accord Sisal Sales*, 274 U.S. at 274-75 & n.*, 276.

2. Review in this case also would permit the Court to address an acknowledged conflict in the lower courts over the meaning of this Court's decision in *United States v. Bowman*, 260 U.S. 94 (1922). There, the Court held that the crime of conspiring to defraud a government-owned corporation (by overbilling it for ship fuel) applied to conduct on the high seas, notwithstanding the usual presumption against extraterritoriality. The Court explained:

> Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. * * *

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to *defend itself* against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.

Id. at 98 (emphasis added).

The lower courts are divided on the meaning of *Bowman*. *See* Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering* United States v. Bowman, 44 San Diego L. Rev. 585, 590-94 (2007). Some have interpreted *Bowman*'s limited exception to hold broadly that even "[a]bsent an express intention on the face of the statutes," Congress's intent to apply a statute extraterritorially "may be inferred from the nature of the offense[]," *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980), regardless of whether the crime is directed against the government itself. "On authority of *Bowman*, courts * * * have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm." *United States v. Plummer*, 221 F.3d 1298, 1304-05 (11th Cir. 2000). This division of authority is *directly implicated* here: The influential decision in *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), *aff'd on other grounds*, 117 F.3d 1206 (11th Cir. 1997), held in reliance on *Bowman*, *id.* at 1515, that Congress *implicitly* authorized RICO's worldwide application in light of the breadth of its prohibitions, *id.* at 1516-17: "As long as the

racketeering activities produce effects or are intended to produce effects in this country, RICO applies." *Id.* at 1517.[2]

Other courts have explicitly "disagree[d]" with that line of cases, recognizing that "*Bowman* was clearly cast in reference to the 'class' of criminal statutes" against the government, and "is not a free standing principle of statutory construction" applicable outside that limited context. *United States v. Martinelli*, 62 M.J. 52, 58 (C.A.A.F. 2005); *accord United States v. Gatlin*, 216 F.3d 207, 211 n.5 (2d Cir. 2000) (Cabranes, J.); *United States v. Gladue*, 4 M.J. 1, 4-5 (C.M.A. 1977).[3] Scholars also have criticized that line of cases for "dramatically chang[ing] the meaning of [*Bowman*]." *Rediscovering* Bowman, 44 San Diego L. Rev. at 592. Review in this case would present an opportunity to restore a proper understanding of *Bowman*.

3. Finally, review in this case would permit the Court to address whether general statutory refer-

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[2] As petitioner notes (Pet. 21 & n.9), *Noriega* largely relied on language in 18 U.S.C. § 1962(c) and (d) prohibiting certain conduct by "*any* person associated with *any* enterprise," which the court characterized as "all-inclusive" language which "do[es] not suggest parochial application." 746 F. Supp. at 1516. But this Court long ago rejected that argument. *See United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) (although statute applied to "any person or persons," words "broad enough to comprehend every human being," presuming Congress did not mean it to apply to foreign citizens on the high seas).

[3] In another context, the government has affirmed this narrow understanding of *Bowman*. *See Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. O.L.C. 321, 330 (1989).

ences to "foreign commerce" suffice to overcome the presumption against extraterritoriality. RICO prohibits specified conduct in connection with an "enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce," 18 U.S.C. § 1962(a)-(c). This Court has "repeatedly held that even statutes that contain broad language * * * that expressly refer to '*foreign* commerce' do not apply abroad." *Aramco*, 499 U.S. at 251 (citing *New York Cent. R.R. v. Chisholm*, 268 U.S. 29 (1925); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). Under those precedents, such "boilerplate language which can be found in any number of congressional Acts" falls far short of what is necessary to overcome the presumption against extraterritoriality. *Aramco*, 499 U.S. at 251. But a recent decision of this Court may raise questions about that settled law. There is language in *Pasquantino v. United States*, 544 U.S. 349 (2005), that a statute that "punishes frauds executed 'in interstate or foreign commerce,' * * * is surely not [one] in which Congress had only domestic concerns in mind." *Id.* at 371-72 (internal quotations and citations omitted). While that statement is plainly *dicta*—the opinion emphasizes that only domestic conduct was at issue, *id.* at 371—it has raised questions about whether boilerplate references to foreign commerce suffice to overcome the presumption against extraterritoriality.

B. The "Effects" Test Provides Scant Guidance For Courts And Legitimate Businesses And Encourages Wasteful Litigation

"[C]ourts have divided over th[e] issue" of "whether RICO applies extraterritorially at all." *Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1351 (11th Cir. 2008). But even among those courts that, like the court below, use the "effects" test to determine the extraterritorial application of RICO, there is such disagreement and confusion about its operation that it provides little guidance to courts and legitimate businesses. Moreover, long experience in other fields in which the test has been used—securities, antitrust, and trademark law—demonstrates the test is so inherently indeterminate, fact-intensive, and unpredictable in application that it is a deeply flawed means for determining the extraterritorial application of a statute as expansive as RICO.

1. Decades of experience using the "effects" test in various contexts reveal persistent confusion about the magnitude and directness of the effects required to warrant extraterritorial application, yielding unpredictable and inconsistent outcomes.

Antitrust. Between the 1940s and the 1970s, most courts applied variations of the test established in *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), which concluded that the Sherman Act applies extraterritorially if an anticompetitive agreement has an intended effect on imports. *Id.* at 443-44. "The already confused effects test [became] even more imprecise following the Ninth Circuit's decision in *Timberlane*

Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976)." *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 n.12 (5th Cir. 2001) ("*Statoil*"). *Timberlane* adopted a "jurisdictional rule of reason," comprised of a relaxed formulation of the "effects" test (whether the challenged conduct had "some effect actual or intended," 549 F.2d at 613-14), and consideration of comity interests.

Because "courts differ[ed] in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists," H.R. Rep. No. 97-686, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487, Congress adopted a statutory "effects" test in 1982's Foreign Trade Antitrust Improvements Act ("FTAIA"), under which the Sherman Act applies to foreign conduct that "has a direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a.

But far from clarifying the "effects" test, section 6a "introduced confusion" to "an area of the law that was already 'confused and unsettled.'" Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 Hous. L. Rev. 285, 286-98 (2007) (quoting *Statoil*, 241 F.3d at 423-24)). Several courts—including this Court—have found section 6a "unclear" and have, on occasion, relied instead on its common-law predecessors. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993) (principally applying the *Alcoa* test); *accord United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (declining to "rest * * * upon the FTAIA"); *Metro Indus., Inc. v.*

Sammi Corp., 82 F.3d 839 (9th Cir. 1996) (applying *Timberlane*). Even courts that apply the FTAIA's "direct, substantial, and reasonably foreseeable effect" standard have been inconsistent in their application. "[C]ourts do not appear to adhere to any particular metric" when applying the test, and standards "lack uniformity and are susceptible to being manipulated to reach a desired outcome." Jordan A. Dresnick, Kimberly A. Piro & Israel J. Encinosa, *The United States as Global Cop: Defining the 'Substantial Effects' Test in U.S. Antitrust Enforcement in the Americas and Abroad*, 40 U. Miami Inter-Am. L. Rev. 453, 486 (2009). That "similar facts are capable of being interpreted quite differently under the 'same' test" reflects the test's inherent indeterminacy. *Id.* at 485.

Lanham Act. "The circuit courts have established a variety of tests" for determining whether foreign conduct has sufficient domestic effect to be actionable under the Lanham Act. *McBee v. Delica Co.*, 417 F.3d 107, 117 (1st Cir. 2005). Some courts require a showing that foreign conduct has "substantial" or "significant" effect on U.S. commerce, *see Int'l Cafe, S.A.L. v. Hard Rock Cafe Int'l (U.S.A.)*, 252 F.3d 1274. 1289 (11th Cir. 2001) (per curiam); *Atlantic Richfield Co. v. Arco Globus Int'l Co.*, 150 F.3d 189, 192 (2d Cir. 1998); *Nintendo of Am., Inc. v. Aeropower Co.*, 34 F.3d 246, 250 (4th Cir. 1994), while others have explicitly disagreed, holding that "*some* effect may be sufficient." *Am. Rice, Inc. v. Arkansas Rice Growers Co-Op. Ass'n*, 701 F.2d 408, 414 n.8 (5th Cir. 1983); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 428 (9th Cir. 1977). The

First Circuit has suggested a sliding scale: Where the purported infringer is not a U.S. citizen, the conduct must have a "substantial effect," *McBee*, 417 F.3d at 120, but for citizens, "a lesser showing of domestic effects" may be enough. *Id.* at 118. Further complicating the analysis, "[t]he case law has also made clear that even indirect effects may count as substantial." Comment, *The Antitrust Model of Extraterritorial Trademark Jurisdiction: Analysis and Predictions After* F. Hoffmann-La Roche, 20 Emory Int'l L. Rev. 651, 662-63 (2006).

Securities Law. "Different circuits have applied different standards in determining whether an alleged nexus to the United States is sufficient to support jurisdiction" under the securities laws. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. MDL-1446, 2005 WL 1798423, at *4 (S.D. Tex. July 26, 2005). Some courts have required a showing of "substantial adverse effect" on American investors. *Robinson v. TCI/US W. Cable Commc'ns Inc.*, 117 F.3d 900, 905 (5th Cir. 1997). Others have held that the harm must not only be "substantial," but "foreseeable" too. *Mak v. Wocom Commodities Ltd.*, 112 F.3d 287, 289-90 (7th Cir. 1997). Some courts have held, without significant elaboration, that "[t]ransactions with only remote and indirect effects in the United States do not qualify as substantial." *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1045, 1051 (2d Cir. 1996). "[T]he true scope of the effects test has never been adequately defined" in this context, "and it has the potential to be extremely broad." W. Barton Patterson, Note, *Defining the Reach of the Securities Exchange Act: Extraterritorial Application*

of the Antifraud Provisions, 74 Fordham L. Rev. 213, 222-23 (2005).

RICO. Given the degree of confusion the "effects" test has engendered in every other field, it is unsurprising that its application to RICO has created conflict. *Cf. Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663-64 (9th Cir. 2004) (looking to antitrust and securities cases to apply the "effects" test to RICO).

The D.C. Circuit concluded that petitioner's conduct overseas—privately supplying research to Brown & Williamson, founding international organizations that do not operate in the United States, App. 59a-60a—resulted in the "direct" and "foreseeable" (*id.* 59a) "dece[ption of] American consumers." *Id.* at 6a. But other courts of appeals have been far more restrained in their application of the "effects" test. In *Butte Mining PLC v. Smith*, 76 F.3d 287 (1996), by contrast, the Ninth Circuit held that the plaintiffs had not "alleged any effect" (*id.* at 290) to justify applying RICO to a fraud committed against one British and several domestic corporations, although domestically purchased U.S. assets were the subject of the fraud, two defendants were U.S. citizens, and at least one major stockholder of the defrauded corporation was American. *Id.* at 290-91. The court held RICO did not apply because the steps taken domestically were "merely preparatory," *id.* at 291, but offered no guidance for how to distinguish "preparatory" conduct from that which would justify haling foreign defendants into U.S. courts.

The application of the "effects" test is sufficiently uncertain that courts have reached diametrically opposed conclusions based on *virtually indistinguish-*

able conduct. In *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (1988), for example, the *en banc* Ninth Circuit held that the government of the Philippines could maintain a RICO action against its former president based on the effect of his domestic investment of assets fraudulently obtained abroad, because "[t]he effect on the commerce of the United States of * * * bringing stolen property into the country is palpable." *Id.* at 1358. The Fifth Circuit, however, held a Mexican corporation could not use RICO to sue its former chairman, who, like Ferdinand Marcos, was accused of "convert[ing]" his employer's assets and using them to purchase property in the United States. *Aerovias de Mexico, S.A. v. De Prevoisin*, No. 99-41162, 2000 WL 992495, at *1 (June 29, 2000) (per curiam). While acknowledging that "some of the proceeds of the allegedly fraudulent activity may have been used to procure property in the United States," the court held that effect was so "'far removed from the consummation of the fraud [that it] will not suffice to establish jurisdiction.'" *Id.* (quoting *North South Fin.*, 100 F.3d at 1051). Similarly, in *Renta*, the Eleventh Circuit held that "[i]t is clear that the effects test is not satisfied" where a foreign bank was looted by a dual Dominican and U.S. citizen, although some funds were transferred to American banks and one of the goals of the scheme "was enrichment of an American entity * * * controlled by an American defendant." 530 F.3d at 1352.[4]

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[4] It would be no answer, even if true, that the courts' different tests reflect immaterial variations with little practical effect. As the House Judiciary Committee recognized in enacting

2. The confusion that attends every application of the "effects" test reveals an important truth about its basic nature: The test is incapable of consistent or predictable application. *See, e.g.*, Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 Vand. L. Rev. 1455, 1461 (2008) (noting that "courts have reached contrary results on nearly identical facts"). And because in a global economy, "everything affects everything," 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 270, at 255 (3d ed. 2006), the "effects" test "provides an almost limitless breadth" to the exercise of extraterritorial jurisdiction. Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 McGeorge L. Rev. 83, 98 (2006); *accord* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. Rev. 598, 611 (1990) (noting that use of the "effects" test has "resulted in a sharp rise in extraterritorial actions").

3. Inquiry into whether foreign conduct "has a 'substantial effect on United States commerce' is highly fact-dependent." Comment, 20 Emory Int'l L. Rev. at 662. Tests whose application "turn[s] on a welter of specific facts" are "inherently unpredictable" and "present powerful incentives for increased

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FTAIA despite assurances that there was "no *significant* inconsistency" in the application of the "effects" test, H.R. Rep. No. 97-686, at 5-6, *reprinted in* 1982 U.S.C.C.A.N. at 2490-91, even uncertainly in the *formulation* of the test is harmful: "Businessmen and * * * counsel cannot safely ignore the current differences in formulation." *Id.* at 6, *reprinted at* 1982 U.S.C.C.A.N. at 2491.

litigation on the jurisdictional issue itself." *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (Bork, J.). As this Court recently observed, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp. v. Friend*, No. 08-1107, slip op. at 15 (Feb. 23, 2010). Even if the extraterritoriality inquiry is not jurisdictional, those concerns are squarely implicated by the "effects" test. Such fact-intensive determinations are not amenable to judgment on the pleadings, so that parties can promptly determine whether a suit will proceed, *see, e.g.*, *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998), and may require detailed discovery into a host of subjects, including myriad potential economic effects. *See Laker*, 731 F.2d at 924 (in considering effect of airlines' antitrust conspiracy, considering presence of U.S. travelers in relevant market, location aircraft were built, means of financing, and citizenship of debtholders).

Thus, foreign defendants will be subjected to the burdens of intrusive discovery, pretrial litigation, and possibly trial, even before a plaintiff's claims can be determined to be extraterritorial. In complex litigation, "the cost of pretrial discovery * * * can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak." *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J.). The "danger of vexatiousness" is especially strong in RICO cases given "the presence of a treble damages provision." *Int'l Data Bank, Ltd. v.*

Zepkin, 812 F.2d 149, 153 (4th Cir. 1987) (internal quotations and citation omitted). Moreover, subjecting a company to intrusive discovery and extensive pretrial litigation may well impose burdens inconsistent with the policies of its home nation. *See North South Fin.*, 100 F.3d at 1052. This is a critical concern because the vast majority of RICO litigation is initiated not by the government, but by private plaintiffs seeking treble damages. *See generally* Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999) (noting private plaintiffs often do not "exercise the degree of self-restraint and consideration of foreign governmental sensibilities" as the government).

4. The use of such a vague and manipulable standard also deters beneficial commerce. A test as malleable as the "effects" test makes it impossible for legitimate foreign businesses "to determine in advance whether their activities are likely to subject them to [suit]" in U.S. courts. Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 Harv. L. Rev. 1310, 1321 (1985). As this Court recently observed, "[s]imple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions." *Hertz Corp.*, slip op. 16. The risk of protracted litigation and ruinous damage judgments deters legitimate businesses from engaging in activities that *could* subject them to suit here, "discouraging foreign investment in United States businesses" and inhibiting the flow of goods and capital. Br. of the United Kingdom at

25, *Morrison v. Nat'l Australia Bank Ltd.*, No. 08-1191. "The need for predictability suggests that a jurisdictional test should be susceptible of consistent application," Note, 98 Harv. L. Rev. at 1321, which the "effects" test plainly is not.

These are valid considerations when construing a statute used overwhelmingly for private litigation. Mindful of "the practicalities of RICO litigation," *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 153 (1987), this Court adopted a uniform statute of limitations for RICO lawsuits to "avoid intolerable 'uncertainly and time-consuming litigation.'" *Id.* at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)). "The federal interests in uniformity, certainty, and the minimization of unnecessary litigation" (*Wilson*, 471 U.S. at 275) likewise strongly counsel against using the "effects" test to determine RICO's extraterritorial application.

C. A Straightforward Application Of This Court's Precedents Confirms That RICO Does Not Apply Extraterritorially

1. In determining whether Congress intended a statute to have extraterritorial application, courts "look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'" *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). Unlike many criminal statutes,[5] RICO "is silent as to any extra-

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[5] *See, e. g.*, 18 U.S.C. § 112(a), (e) (protection of internationally protected person outside U.S.); *id.* § 175(a) (biological

territorial application." *North South Fin.*, 100 F.3d at 1051. Tellingly, "Congress failed to provide any mechanisms for overseas enforcement" of RICO. *Aramco*, 499 U.S. at 256. For example, RICO's civil investigative demand provisions (*see* 18 U.S.C. § 1968) contemplate only *domestic* application, in that they can be enforced and challenged only in the "judicial district in which such person [served with a demand] resides, is found, or transacts business." *Id.* § 1968(g), (h). RICO makes no provision for service of process in a foreign country. *See* Pet. 15-16, 19 & n.7. And it is "reasonable to conclude that had Congress intended [RICO] to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures." *Aramco*, 499 U.S. at 256.

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weapon offenses outside U.S.); *id.* § 229(a), (c) (chemical weapon offenses outside U.S.); *id.* § 878(a), (d) (threats against internationally protected person outside U.S.); *id.* § 1091(a)-(c), (d)(5) (genocide outside U.S.); *id.* § 1116(c) (murder or attempted murder of internationally protected person outside U.S.); *id.* § 1201(a)(1) (kidnapping where victim transported in foreign commerce); *id.* § 1201(a)(2), (3) (kidnapping where act against victim takes place in special maritime and territorial jurisdiction or special aircraft jurisdiction of U.S.); *id.* § 1201(e) (kidnapping of "an internationally protected person" outside U.S.); *id.* § 1203(b) (hostage taking outside U.S.); *id.* § 1596 (human trafficking offenses outside U.S.); *id.* §§ 1651-53 (piracy on high seas); *id.* § 2331 (terrorist acts abroad against U.S. nationals); 49 U.S.C. § 46502(b) (aircraft piracy outside special aircraft jurisdiction of U.S.). Foreign nationals may be prosecuted for numerous federal crimes committed within the "special maritime and territorial jurisdiction of the United States," *see, e.g.*, 18 U.S.C. § 113 (assault); *id.* § 114 (maiming), which is explicitly defined to include specified areas outside the United States. *Id.* at § 7.

The absence of even rudimentary provisions to accommodate RICO's application abroad not only confirms that Congress did not intend the statute to apply extraterritorially; it also illustrates how the presumption against extraterritoriality "protect[s] against unintended clashes between our laws and those of other nations." *Aramco*, 499 U.S. at 248. Requiring Congress to speak clearly before a statute will be applied extraterritorially ensures it has given its considered judgment to implementation overseas so the statute "provid[es] just the sort of nuanced specificity and limitations" required to avoid conflict. Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 205-06 (2008). Congress must make the many difficult foreign-relations judgments necessary to implement a complex statute, *id.*, rather than having courts resolve them on an *ad hoc* basis through litigation.

2. Finally, RICO's legislative history confirms that Congress did not intended it to apply extraterritorially.[6] Congress enacted the Organized Crime Control Act of 1970 (Title IX of which was RICO) as the culmination of several years of federal investigations and congressional hearings into crime in America. A seminal document in this effort was the 1967 report of the President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* ("Report"),

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[6] This Court has repeatedly looked to legislative history in interpreting RICO. *See, e.g., Rotella v. Wood*, 528 U.S. 549, 557 (2000); *Reves v. Ernst & Young*, 507 U.S. 170, 179-83 (1993); *H.J. Inc. v Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989).

which provided much of the factual foundation for, and the recommendations that were embodied in, the Organized Crime Control Act. *See* 115 Cong. Rec. 5877 (1969); *id.* at 9951. It is therefore telling that the report scarcely mentions areas outside the United States other than as a source for narcotics sold domestically. Report at 217, 220. The Report emphasized that two dozen "[o]rganized criminal groups are known to operate in all sections of the Nation," Report 191-92, concluding that "[o]rganized crime *in its totality* thus consists of these 24 groups allied with other racket enterprises to form a loose confederation operating in large and small cities." *Id.* at 193 (emphasis added). Floor debates on "the organized crime problem in the United States," 116 Cong. Rec. 35,295 (1970) (statement of House sponsor Rep. Poff), focused on the "enemy within." *See* 115 Cong. Rec. 5875 (statement of Sen. McClellan).

It is thus unsurprising that the Organized Crime Control Act, like other bills offered on the subject, was described as "[a]n Act relating to the control of organized crime *in the United States*." Pub. L. No. 91-452, 84 Stat. 922 (Oct. 15, 1970) (emphasis added); *see also* 116 Cong. Rec. 31,914 (1970) (H.R. 19215); *id.* at 32,347 (H.R. 19340). *See generally United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.) (declining to apply a provision entitled "an act for the punishment of certain crimes against the United States" to foreign nationals on the high seas, in part because the title "furnish[es] some aid in showing what was in the mind of the legislature"). The Act made its explicit goal the elimination of "organized crime activities in the

United States." 84 Stat. 923.[7] The members emphasized that "[o]ur attack must be nationwide," 115 Cong. Rec. 10,712 (statement of Sen. sponsor, Joseph Tydings), because "[o]nly a nationally directed campaign against organized crime—including legislation such as [this]—can contain this national menace." 116 Cong. Rec. 819 (1970) (statement of Sen. Scott); *accord* 116 Cong. Rec. 35,296 (statement of Rep. Poff) (addressing organized crime is "the highest priority in the ordering of our domestic affairs"). The provisions of RICO were tailored to fit the problem. Thus, for example, Congress provided for nationwide service of process to address "the nationwide nature of the activity of organized crime." S. Rep. No. 91-617, at 161 (1969).[8]

It is striking that, in hundreds if not thousands of pages of legislative history, there is scarcely *any* reference to activity outside the United States aside from passing references to the foreign origins of narcotics, 115 Cong. Rec. 5874 (1969), and the Sicilian organizations that served as models for some American groups, 116 Cong. Rec. 18,913 (1970)—much less any reference to foreign enforcement efforts. It is difficult to escape the conclusion that if Congress

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[7] It would have been a simple matter for Congress to express a wish to address "*the effect of foreign organized crime in the United States*," *see* Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET,"* 73 Minn. L. Rev. 1023, 1077 (1989). Its failure to do so is telling.

[8] Although Congress recognizes that RICO does not provide for international service of process, *see* 134 Cong. Rec. 22,374 (1988) (statement of Rep. Conyers), efforts to amend RICO to provide for it have failed. *See, e.g.*, S.1523, 100th Cong. (1987); H.R. 2983, 100th Cong. (1987).

had intended RICO to apply extraterritorially, "there would have been at least some mention of it in the legislative history, even if not in the statute." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 490 (1985).[9]

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[9] Nor can it be maintained that the Congress that enacted RICO believed that regulation of foreign conduct with domestic effects was not "extraterritorial." The following year, the congressionally chartered National Commission on Reform of Federal Criminal Laws proposed codifying the circumstances under which there would be "extraterritorial jurisdiction" over crimes, and its proposal included offenses with such obvious domestic effects as "entry of persons or property into the United States." National Commission on Reform of Federal Criminal Laws, *Final Report: A Proposed New Federal Criminal Code* § 208(e), at 21 (1971). Tellingly, among the eight proposed categories, there was no category for foreign actions having domestic effects. *See also* The Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. § 204 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
Petitioner,

—v.—

UNITED STATES OF AMERICA et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE INTERNATIONAL CHAMBER OF COMMERCE UNITED KINGDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The International Chamber of Commerce United Kingdom ("ICC United Kingdom") respectfully submits this brief as *amicus curiae* in support of granting the petition, which raises issues in which ICC United Kingdom and its members have a vital interest. All parties have been given the required notice and have consented in writing to the filing of this brief, as evidenced by consents on file with the Clerk of this Court.[1]

ICC United Kingdom is the British National Committee of the International Chamber of Commerce ("ICC"), the largest and most representative business organization in the world. ICC United Kingdom works to promote and facilitate international trade and investment as a force for economic growth, job creation and prosperity.

Among other functions, ICC promotes voluntary rules governing the conduct of business across borders, which rules are observed in countless thousands of transactions every day; it provides essential trade-related services such as the ICC International Court of Arbitration, the world's leading arbitral institution; and it provides a business voice on key issues related to international trade and investment in key intergovernmental fora such as the United

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[1] No portion of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* and its counsel made any monetary contribution to fund the preparation or submission of this brief.

Nations, the World Trade Organization and the G-20.

As an ICC national chapter, ICC United Kingdom works to provide the views of U.K. members in the development of ICC's policy positions and rules, as well as representing the interests of international business to U.K. policymakers and regulators. ICC United Kingdom's policy positions are based on the consensus views of its cross-sectoral membership, which includes major international companies across financial services, manufacturing, pharmaceuticals, and energy, as well as many small companies, law firms, and trade associations.

ICC has been concerned for many years about the adverse effect on international trade and investment of extraterritorial application of national laws. It constituted a Task Force on Extraterritoriality and issued the ICC *Policy Statement on Extraterritoriality and Business* on July 13, 2006.

In the present case, the Court of Appeals held that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), applied to the petitioner's foreign conduct, giving RICO exterritorial application, which may infringe on other States' legitimate interests and have an adverse impact on international business. The circumstances in which RICO and other U.S. statutes may be given extraterritorial application presents a critically important issue for the members of ICC United Kingdom, as well as other non-U.S. business entities.

SUMMARY OF ARGUMENT

The petition presents an important question of whether the extraterritorial application of RICO to the foreign conduct of petitioner and other similarly situated foreign persons based on tenuous "effects" in the United States, as envisaged by the Court of Appeals for the District of Columbia Circuit, may infringe on other nations' sovereignty. Under recognized principles of comity and this Court's precedents, acts of Congress should be construed on the assumption that Congress intended to respect the legitimate sovereign interests of other states. The decision below, however, treats other states' interests in regulating conduct within their borders as irrelevant.

Remarkably, the D.C. Circuit's decision states that application of U.S. law to foreign conduct under the "effects test" does not even raise an issue of the presumption against extraterritorial application of statutes. That holding ignores not only developments in the law in this Court and in other circuits, but also the strong reaction of the U.K. and other nations, which have regarded U.S. courts' adoption and application of the "effects test" as an invasion of their sovereign interests and have adopted blocking measures intended to protect their own nationals against its application.

The United States, too, has recognized that law-enforcement problems transcending national boundaries are better approached through cooperation than through the automatic extension of U.S. law to foreign conduct. For example, the United States has

recently subscribed to two treaties that endorse a cooperative approach among nations in combating corruption and organized crime. These treaties recognize the importance of having each state take responsibility for conduct within its own legitimate regulatory sphere.

The resolution of the proper extraterritorial reach, if any, of RICO is important not just for cooperation among nations but also for the legitimate interests of international business. Given the unpredictable application of the "effects test" and the split among circuits on its application, companies throughout the world have no clear answer about the extent to which their entirely foreign conduct may be deemed to subject them to treble damages liability in the United States. American companies, as well, may find themselves subject to regulation by foreign states for their purely domestic conduct, in the event that a broad "effects test" is emulated abroad. As a matter of fundamental fairness, as well as respect for the sovereignty of other nations, businesses should be able to discern what laws apply to them and not be arbitrarily subjected to overlapping and possibly inconsistent legal regimes.

ARGUMENT

I.

THE D.C. CIRCUIT'S APPLICATION OF THE "EFFECTS TEST" IS INCONSISTENT WITH THIS COURT'S HOLDINGS THAT U.S. STATUTES SHOULD BE CONSTRUED TO TAKE ACCOUNT OF FOREIGN SOVEREIGNTY

This Court has long recognized that, absent a clear expression of contrary intent, acts of Congress are assumed to apply in the United States only. In the decision below, however, the Court of Appeals for the District of Columbia Circuit held that "when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply." App. 58a. According to the Court of Appeals, conduct meets the "effects test," and applying U.S. law to it is therefore "'*not* an *extraterritorial* assertion of jurisdiction,'" if the conduct has "substantial domestic effects." *Id.* (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984)) (emphasis in original).

The Court of Appeals did not limit the term "substantial domestic effects" to actions occurring in or directed at a person or property in the United States. Rather, in affirming the District Court's judgment against petitioner British American Tobacco (Investments) Limited ("BATCo"), the Court of Appeals applied U.S. law to BATCo based solely on its (1) participation in international industry organizations, some of whose members were U.S. companies, and (2) sharing of research information with a U.S. affiliate. App. 59a-60a. The court made no finding that

BATCo itself sold or marketed products in the U.S., that it misled or intended to mislead U.S. consumers, or that it caused, intended or even expected its U.S. affiliate to use the results of its research in any particular way. *Id.*

Under any reasonable view of comity among sovereign nations, the alleged conduct of BATCo in the United Kingdom, aimed at promoting its sale of cigarettes in the United Kingdom, should be regarded as a potential concern exclusively of the U.K. Government, not the U.S. Government. As demonstrated in the petition, the Court of Appeals' broad application of RICO in this case is inconsistent with decisions of the Courts of Appeals in other Circuits. The decision below also disregards this Court's admonition that statutes should be construed with due regard for the authority of other sovereign nations to regulate conduct within their borders.

In particular, in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), this Court reversed a decision of the Court of Appeals for the District of Columbia Circuit with respect to the extraterritorial application of the U.S. antitrust laws. *Amicus*'s parent organization, ICC, filed a brief in that case and welcomed the Court's clarification of that issue. In *Empagran*, the Court applied the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA"), which Congress enacted to rein in the application by the lower courts of the "effects test" in the antitrust context. The Court held that the FTAIA barred application of the antitrust laws to foreign conduct affecting competition in foreign markets, even if it was part of an alleged global

price-fixing scheme involving the U.S. as well. In so holding, this Court did not rely simply on the history of the FTAIA, but reaffirmed the principle that ambiguous statutes should be construed so as "to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164. The Court explained, "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.*

In the present case, the Court of Appeals disregarded that principle. Rather than follow or even cite this Court's decision in *Empagran*, the Court of Appeals drew on its own older precedent in the antitrust context, and simply assumed without any consideration that Congress intended to disregard the legitimate interests of other governments in regulating conduct within their own sovereign territory based on a mere showing of any U.S. effects of the foreign conduct. The difficulties with this approach have been well-stated by an academic commentator:

> The effects test was debatable enough under international law, but the problem was seriously exacerbated when jurisdiction was asserted under that theory without consideration for the consequences for other nations. Under recognized principles of comity, states were obliged to consider and weigh the legitimate interests of other states when taking action that could affect those interests, and were supposed to

> leave the regulation of conduct to the state with the primary interest.

1 James R. Atwood & Kingman Brewster, ANTITRUST AND AMERICAN BUSINESS ABROAD 158 (2d ed. 1981). *Amicus* submits that the Court of Appeals for the District of Columbia Circuit failed in its analysis to give due consideration to the international ramifications of its decision.

II.
THE "EFFECTS TEST" CAUSES NEEDLESS FRICTION WITH FRIENDLY FOREIGN NATIONS

The D.C. Circuit's statement that application of U.S. law under the "effects test" is not extraterritorial application at all is belied by the reaction of other nations to the application of the "effects test" in past cases. Broad claims to extraterritorial jurisdiction, especially as asserted by U.S. courts under the "effects" test, have caused widespread international concern and at times have provoked blocking or retaliatory measures.

These concerns are exemplified by a speech given by the British Secretary of State for Trade during debate in the House of Commons on the Protection of Trading Interests Bill. *See* House of Commons Debate on the Protection of Trading Interests Bill, statement of the Secretary of State for Trade, Hansard, HC Deb 15 November 1979, Vol. 973, cc 1533-1591 ("Hansard, Vol. 973"). The bill was ultimately enacted as the Protection of Trading Interests Act 1980, which, among other things, authorizes the U.K. Government to forbid persons in the U.K. from

complying with extraterritorial measures affecting U.K. trade interests and seeks to counteract the enforcement of judgments for treble or multiple damages, such as arise under the U.S. antitrust laws or RICO. *See* Protection of Trading Interests Act 1980 (c. 11), §§ 1-3, 6-7 (U.K.).

In his speech, the U.K. Secretary of State for Trade made clear that this legislation was motivated largely by efforts to apply U.S. laws extraterritorially to U.K. businesses, including in no small part the "effects test" adopted by some U.S. courts. Referring, in part, to *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), which first adopted the "effects test" in the antitrust context, the Secretary of State said:

> The wide extent and fundamental uncertainty of this claimed reach of United States law through this pernicious extraterritorial effects doctrine has created uncertainty for international industry in this country and elsewhere. The views which I express on this subject are not held just by our Government, they are held and deeply felt in Canada, Australia, South Africa and other countries.

Hansard, Vol. 973, at cc 1535. The Secretary of State made clear that he was expressing the considered view of the British Government in this regard, referring to "practices in which successive United Kingdom governments have taken exception," *id.*, and stating "[w]e are engaged in a delicate and complicated legal matter. I have written down my words

and am choosing them with great care," *id.* at cc 1538.

In the same speech, the U.K. Secretary of State for Trade described the approach favored by the United Kingdom:

> [T]he increasing volume of international trade, the swiftness of modern communications, the international nature of many enterprises and increasing specialization on the part of industrial nations means that, while trading nations are interdependent in a real sense, their economic and commercial policies are bound sometimes to come into conflict. We recognize this, and we believe that the right way to sort out the resulting differences of policy and approach is by intergovernmental discussion and negotiation through established international organizations.

Hansard, Vol. 973, at cc 1534.

The Protection of Trading Interests Act 1980 was enacted with the agreement of all the political parties in Parliament. Similar statutes have been brought into effect in many other countries. *See, e.g.*, Foreign Extraterritorial Measures Act, R.S. 1985, c. F-29 (Canada); Foreign Proceedings (Excess of Jurisdiction) Act 1984, Act No. 3 of 1984 (Australia); Law No. 80-538, 1980 J.O. 1799 (France). The enactment of these statutes demonstrates the widespread international opposition to the extraterritorial application of U.S. law through the use of the effects test.

III.
THE "EFFECTS TEST" IS INCONSISTENT WITH U.S. FOREIGN POLICY AND MODERN STATE PRACTICE

In recent years, the United States has increasingly followed an international consultative approach in dealing with global problems in the fields of crime and corruption, not the unilateral extension of U.S. law based on tenuous "effects" in the United States. This is exemplified and established by two recent multilateral conventions successfully pursued by the State Department: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Senate Treaty Doc. 105-43, KAV 5210 (signed Dec. 17, 1997, ratified by U.S. Dec. 8, 1998, entered into force for U.S. Feb. 15, 1999) (the "OECD Bribery Convention"); and the United Nations Convention Against Transnational Organized Crime, Senate Treaty Doc. 108-16, KAV 6399 (signed Nov. 13, 2000, ratified by U.S. Nov. 4, 2005, entered into force for U.S. Dec. 3, 2005) (the "UN Organized Crime Convention").

A. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Bribery Convention has its roots in the 1979 enactment of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 *et seq.* ("FCPA"), by the U.S. Congress. The FCPA, which was enacted in response to strong concern about certain corrupt international business practices, has had a wide and salutary effect. All American companies, foreign multinational companies that have listed their securities on U.S.

exchanges, and all companies with respect to their actions within the U.S. are subject to its jurisdiction and are required to comply with its provisions.

Following the enactment of the FCPA, however, the argument was made that American businesses were at a disadvantage in international operations in relation to foreign competitors who had not subjected themselves to U.S. jurisdiction. But rather than seek to expand the reach of the FCPA to support prosecution of foreign businesses based on supposed "effects" in the United States, the U.S. Government took a more sensitive, and ultimately more effective, approach. The United States initiated negotiations in the Organisation for Economic Co-operation and Development ("OECD") for a multilateral treaty requiring adhering states to adopt, as part of their own law, measures comparable to the FCPA. The negotiations were successful, and in 1997 the Bribery Convention was adopted by OECD members. The *amicus*'s parent organization, ICC, nominated an expert who was one of the advisors to the OECD Working Group that formulated the OECD Bribery Convention.

The OECD Bribery Convention "seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials without requiring uniformity or changes in fundamental principles of a Party's legal system." *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ¶ 2 (adopted by Negotiating Conference Nov. 21, 1997). The Convention is clear that jurisdiction is to be territorial or over the nationals of

a state. OECD Bribery Convention § 4. There is no purported extraterritorial jurisdiction over non-nationals. *Id.* § 4(1), (4). The Convention makes provision for consultation when more than one party has jurisdiction and for mutual legal assistance. *Id.* § 9. Thus, the U.S. obtained substantially the same, if not greater, legal reach for anti-bribery measures as an extraterritorial "effects test" application of the FCPA, but it did so by consent, with the active and willing participation of foreign states and with full respect for the "sovereign authority of other nations." *Empagran*, 542 U.S. at 164.

B. The UN Convention Against Transnational Organized Crime

The United States followed a similar approach in pursuing the UN Organized Crime Convention, the purpose of which is "to promote cooperation to prevent and combat transnational organized crime more effectively." UN Organized Crime Convention § 1. Following ratification, the UN Convention became binding on the United States on December 3, 2005.

The subject matter and structure of the UN Organized Crime Convention have significant parallels with RICO. It has similar predicate offences ("serious crime," defined to include conduct punishable by at least four years imprisonment with specific inclusions of money laundering, corruption and obstruction of justice). UN Organized Crime Convention §§ 6, 8, 23. There is the same key element of participation in an organized criminal group. *Id.* § 5. Legal persons such as companies are also covered by the UN Convention. *Id.* § 10.

As interpreted by the court below, however, RICO extends far beyond what the UN Organized Crime Convention contemplates. The UN Organized Crime Convention's provisions on jurisdiction are carefully worded and are contained in Articles 4 and 15. Article 4 contains a strong statement of the principle of sovereign equality: "Nothing in this Convention entitles a State party to undertake in the territory of another State the exercise of jurisdiction and performance of the functions that are reserved exclusively for the authorities of that other State by its domestic law." *Id.* § 4(2). This principle is further supported by the statement that jurisdiction is to be territorial. *Id.* § 15(1). There is an exception to this rule, in that the Convention permits a country to assert jurisdiction over an offence committed against its own national or outside its territory with a view to commission of a serious crime within the territory or to launder the proceeds of crime within the territory. *Id.* § 15(2). This principle, however, is subject to the principle of respect for other states' sovereignty within their territory set forth in § 4. *Id.* § 15(2). Further, the Convention permits a state to exercise criminal jurisdiction "in accordance with its domestic law," but provides that this exercise is "[w]ithout prejudice to norms of general international law." *Id.* § 15(6).

IV.
THE "EFFECTS TEST" CAUSES NEEDLESS UNCERTAINTY FOR BUSINESSES AROUND THE WORLD.

Lastly, the decision below creates unnecessary uncertainty for members of ICC United Kingdom and countless other foreign persons as to whether they may be subject to liability for treble damages under RICO based on allegations that their purely foreign conduct had some minimal, indirect effect in the United States. Because RICO has been so broadly interpreted, and because the "effects test" is vague and unpredictable in its application, the conflict in application of that statute in different circuits provides no clear answer for companies throughout the world about the extent to which their entirely foreign conduct may be deemed to subject them to treble damages liability in the United States.

Moreover, actions taken by an important trading nation like the U.S. can influence the behavior of other nations, not only by provoking retaliation or blocking but also by serving as a model for others. In recent years, the European Union and other foreign regulators have become more aggressive in enforcing their antitrust laws and other business laws. If ill-considered decisions by U.S. courts are allowed to blur the accepted limits of national regulatory powers, U.S. companies could one day find themselves subject to enforcement actions by foreign countries based on their wholly U.S. actions having an alleged "effect" overseas. To be able to compete fairly, businesses, whether in the U.S., the U.K. or another country, are entitled to know the rules that apply to

them and should not be unnecessarily subjected to overlapping and possibly conflicting sets of laws.

CONCLUSION

In sum, actions by Congress, this Court, the U.S. Government and friendly foreign nations over the last 25 years all point toward a cooperative approach to legal problems arising from international trade. The opinion below, however, is a throwback to earlier doctrine, which views the world as if the United States were the only regulator. That approach fails to take account of the interests of comity to foreign nations and the legitimate expectations of companies doing business internationally. For these reasons, *amicus* submits that the Court should grant the petition to resolve the important questions presented and put an end to any uncertainty.

Respectfully submitted,

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IN THE
Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* KBR, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amicus curiae KBR, Inc. ("KBR") is a global engineering, construction, and services company supporting the energy, hydrocarbon, government services, minerals, civil infrastructure, power, and industrial sectors in countries around the world. KBR is incorporated under the laws of Delaware and maintains its corporate headquarters in Houston, Texas. KBR and affiliated entities (collectively the "KBR Defendants") are currently defending a lawsuit in federal district court that involves the extraterritorial application of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). *See Adhikari v. Daood & Partners*, Case No. 09-cv-1237 (S.D. Tex.).

In *Adhikari*, plaintiffs, all nationals of Nepal, brought RICO claims against the KBR Defendants for alleged conduct occurring entirely outside of the United States, principally by separate foreign companies who subcontracted with the KBR Defendants to provide services related to the Iraq War effort. The district court denied the KBR Defendants' motion to dismiss the RICO claim, relying on allegations that the KBR Defendants "gained substantial economic benefit" from the conduct underlying the RICO allegations. *Adhikari*,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

No. 09-cv-1237, Dkt. #168, at 22 (Nov. 3, 2009). The district court held that general economic benefits and competitive advantage that the KBR Defendants allegedly derived from the RICO "enterprise" satisfied the "effects" test for extraterritorial application of RICO. The KBR Defendants subsequently filed a motion to certify the issue for interlocutory appeal, but that motion was denied by the district court on March 1, 2010.

KBR has a strong interest in resolution of the question presented of the extraterritorial application of RICO. This Court's determination of that question on the merits would not only directly affect the RICO claims in *Adhikari*, but would also provide important predictability to global services providers like KBR that engage in foreign operations and rely on foreign subcontractors. RICO's broad prohibitions against criminal enterprises can be easily manipulated by plaintiffs, as in *Adhikari*, in an effort to impute the alleged conduct of foreign actors to American companies. The availability of treble-damages RICO claims predicated on wholly foreign conduct fosters uncertainty in the management of legal risks for global companies and improperly invites litigation of foreign claims in American courts.

In its petition for certiorari, British American Tobacco (Investments) Limited ("BATCo") has demonstrated in detail the error of the D.C. Circuit's extraterritoriality ruling, and analyzed the conflicts of authority justifying this Court intervention. Pet. 11-36. KBR will not repeat that analysis. KBR instead offers this brief as *amicus curiae* to bring two important considerations to the Court's attention: (1) the jeopardization of international comity by extra-

territorial application of a broad public-order statute like RICO that predicates relief on local crimes and provides for treble damages and structural injunctions, and (2) the improper incentives for private litigants to reconstitute foreign claims as RICO claims so as to invoke the jurisdiction of American courts and avail themselves of both favorable procedures and expansive civil RICO remedies.

SUMMARY OF ARGUMENT

In the decision below, the D.C. Circuit effectively reversed the presumption against the extraterritoriality of federal law established by this Court's precedents. It held that federal statutes are deemed to reach wholly foreign conduct that has direct and substantial effects in the United States; indeed, according to the court, the presumption against extraterritoriality is not even implicated if such effects are alleged. Pet. App. 58a. The D.C. Circuit went astray in so ruling; as petitioners demonstrate, such effects from foreign conduct may provide a proper basis for federal jurisdiction only if plaintiffs can *overcome* the presumption that Congress does not legislate extraterritorially. Pet. 11-17.

This Court's review is necessary because of the critical importance of the presumption against extraterritoriality in an era of globalization. The presumption is rooted in the separation of powers, ensuring that Congress and not the judiciary decides the difficult and delicate questions inherent in the projection of American law abroad. The presumption promotes international comity because it prevents

friction with foreign sovereigns arising from claims that Congress has not authorized under federal law. Foreign sovereigns jealously guard their territorial jurisdiction. Statutes like RICO that impose onerous criminal sanctions (including stiff criminal forfeiture provisions) and broad civil remedies, if extended to conduct occurring exclusively in foreign territory, would trench upon traditional sovereign prerogatives and kindle resentment. The unusual breadth of RICO, and the mischief threatened by its extension to foreign disputes, make this Court's review imperative.

Not only does the extraterritorial application of RICO entail serious intrusion upon foreign sovereign authority, but it prejudices multinational companies and imposes substantial and unwarranted burdens upon the federal courts. Even within its proper domestic sphere, RICO is notorious for its malleability, and for the ill effects of converting ordinary civil disputes into federal racketeering claims. Foreign plaintiffs can and do take advantage of that same malleability to refashion foreign-law claims as RICO claims, and their incentives to do so are manifold. The treble damages, attorney's fees, and structural injunctions available under RICO dramatically increase the settlement value of claims, and the invocation of federal court jurisdiction avails foreign plaintiffs of American procedural advantages (such as discovery, jury trials, class actions, and contingent-fee arrangements with counsel) that are commonly unavailable in foreign courts. Plaintiffs will enjoy those advantages not only as to the RICO claims, but also as to any foreign claims that the district court may hear in the exercise of

supplemental jurisdiction. The challenge of having fact-based RICO claims dismissed on the pleadings or on summary judgment only heightens the difficulties that defendants will face. Foreign RICO claims will proliferate under the aberrant rule below, and this Court should intervene to prevent the litigation distortions and burdens that extraterritorial application of RICO will invite.

ARGUMENT

I. This Court's Precedent Establishes a Strong Presumption Against Extraterritorial Application Of Federal Law.

A. The Presumption Against Extraterritoriality Ensures That International Comity Is Not Jeopardized Without Explicit Congressional Action.

The presumption against extraterritorial application of United States law is an unwavering principle of American jurisprudence. When Congress enacts legislation regulating conduct, courts operate under "the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small v. United States*, 544 U.S. 385, 388-89 (2005); *Sandberg v. McDonald*, 248 U. S. 185, 195 (1918). If Congress fails to use "words which definitely disclose an intention to give it extraterritorial effect," *New York Central R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925), the statute is "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *Am. Banana Co. v. United Fruit*

Co., 213 U.S. 347, 357 (1909); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 265 (1991) ("*Aramco*").

Several policy considerations underlie the presumption against extraterritorial jurisdiction. *See Smith v. United States*, 507 U.S. 197, 204 n.5 (1993). The first consideration supporting the presumption is the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.*; *see also Foley Bros.*, Inc., *v. Filardo*, 336 U.S. 281, 285 (1949) ("It is based on the assumption that Congress is primarily concerned with domestic conditions.").

Second, the presumption reflects the judicial branch's respect for the separation of powers and its deference to Congress in the sensitive arena of foreign affairs. Exercising the legislative power, Congress is "able to calibrate its provisions in a way that [courts] cannot." *Aramco*, 499 U.S. at 259. The judiciary accordingly looks to Congress for a positive sign of a statute's reach. *See Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 444 (2007) (citing *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972)). Courts leave it "in Congress' court" to determine to what extent a statute has "extraterritorial thrust," and refrain from "forecasting Congress' likely disposition" by trying to divine extraterritorial intent from an equivocal text. *Id.* at 458-59; *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (requirement of congressional intent "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes"). Therefore, courts assume "'that Congress legislates against the backdrop of the presumption against

extraterritoriality.'" *Smith*, 507 U.S. at 204 (quoting *Aramco*, 499 U.S. at 248).

A third and equally important consideration is the "desire to avoid conflict with the laws of other nations." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993). Application of United States law to foreign conduct, while constitutionally permissible, *Aramco*, 499 U.S. at 248, risks "'an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.'" *Chisholm*, 268 U.S. at 31-32 (citation omitted); *see also* Ellen S. Podgor, *Extraterritorial Criminal Jurisdiction: Replacing "Objective Territoriality" With "Defensive Territoriality," in 28 Studies in Law, Politics & Society* 117, 124-25 (Austin Sarat & Patricia Ewick eds., 2003) (discussing the repercussions of expansive extraterritorial jurisdiction). Given the primacy of territorial jurisdiction, *cf.* U.N. Charter art. 2, para. 7 (forbidding UN interference in domestic jurisdiction); G.A. Res. 48/124, U.N. Doc. A/RES/48/124 (Dec. 20, 1993) (affirming principle of non-interference in sovereign internal affairs), international law "limit[s] the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citing Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2) (1986)). Because Congress is presumed to act in conformity with customary international law, courts "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.*; *see also Microsoft*

Corp., 550 U.S. at 455 (same); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J. dissenting) (describing "'prescriptive comity'" as "the respect sovereign nations afford each other by limiting the reach of their laws"). The presumption thus "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248.

Extraterritorial application of American law impinges on foreign sovereignty by forcing foreigners to "bear the costs of domestic regulation, even though foreigners (*i.e.*, those beyond the state's territorial borders) are nearly powerless to change those regulations." *See* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 Minn. L. Rev. 815, 859-60 (2009); *see also* See Mark P. Gibney, *The Extraterritorial Application of U.S. Laws: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. Int'l & Comp. L. Rev. 297, 312-13 (1996) (describing the undemocratic nature of extraterritorial laws).

Moreover, the presumption against extraterritoriality is not just a matter of deference to foreign sovereigns; it protects the United States and its nationals against retaliatory actions by foreign states. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); Parrish, *supra*, 93 Minn. L. Rev. at 857. Foreign sovereigns will feel less constrained in giving their own laws extraterritorial effect if United States courts aggressively grant American laws extraterritorial reach. Furthermore, several

countries have reacted to extraterritorial application of United States law by some courts by enacting "blocking statutes" to prevent foreign discovery or other assistance to U.S. litigation, and by rejecting enforcement of United States judgments. *See, e.g.*, Restatement (Third) of Foreign Relations intro, note, at 304; Amicus Brief of the Federal Republic of Germany in *Empagran*, No. 03-724, 2004 WL 226388, at *27-*28 (Feb. 3, 2004). Far better for courts to reject extraterritorial jurisdiction where congressional intent is unclear, leaving it to Congress to put its house in order.

Where, as here, a federal statute contains criminal penalties, the presumption against extraterritorial application is especially acute. Historically, the Court has expressed reluctance to give criminal laws extraterritorial effect, noting that "'[c]rimes are in their nature local, and the jurisdiction of crimes is local.'" *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (quoting Sir William Blackstone); *see also United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-31 (1818) (declining to apply federal statute punishing piracy to conduct of foreign nationals on a foreign ship).[2] Because the protection of private individuals and property abroad is typically a prerogative of the territorial sovereign, this Court

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[2] The presumption against extraterritorial application of United States law was recognized as early as 1795 in an opinion of then Attorney General Bradford. *See* Breach of Neutrality, 1 U.S. Op. Att'y Gen. 57, 58, 1795 WL 329 (U.S.A.G. 1795) ("as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States").

has demanded a clear statement of congressional intent to apply general federal criminal statutes to conduct occurring abroad:

> Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. *If punishment of them is to be extended to include those committed out side of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.*

United States v. Bowman, 260 U.S. 94, 98 (1922) (emphasis added). The Court has thus "staked out a position rejecting broad extraterritorial application of criminal law in the absence of express congressional mandate." Ellen S. Podgor & Daniel M. Filler, *International Criminal Jurisdiction in the Twenty-First Century: Rediscovering United States v. Bowman*, 44 San Diego L. Rev. 585, 588 (2007).

Finally, the presumption against extra-territoriality operates with force when the statute affords substantial civil remedies different in kind from those available under foreign law. As this Court has noted in limiting the extraterritorial reach of the antitrust laws, "even where nations agree about

primary conduct, say price fixing, they disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 164. This Court noted that "[t]he application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy." *Id.* The Court further observed that "several foreign nations" protested that "apply[ing] our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." *Id.* [3]

B. The Substantial Risks To International Comity From Extraterritorial Application of RICO Support Review of the Ruling Below.

All these considerations militate against the extraterritorial application of RICO. First, RICO is devoid of the requisite "'specific language' ... reflecting congressional intent" "to apply the statute

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[3] Foreign countries frequently object to extraterritorial applications of United States law. *See, e.g.*, *McCulloch*, 372 U.S. at 16-17, 21 (acknowledging "vigorous protests from foreign governments," among other considerations, in ultimately holding that National Labor Relations Act should not apply to foreign-flag ships employing foreigners); Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. Rev. 523, 523-24 (1993) ("The United States has offended the sovereignty of other countries" by "impos[ing] its regulations on transactions that may be viewed as essentially foreign"); *In re Westinghouse Elec. Corp., Uranium Contracts Litig.*, 1978 All E.R. 434 (H.L. 1977) (attempts by the United States to apply its laws extraterritorially are "not in accordance with international law").

abroad." *Aramco*, 499 U.S. at 251-52 (citation omitted); *see Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991) ("the language and legislative history of RICO fail to demonstrate clear Congressional intent to apply the statutes beyond U.S. boundaries"). Second, the wide-ranging predicate offenses that constitute unlawful racketeering under RICO include many ordinary crimes against private individuals and property that are local in nature and under *Bowman* are presumptively not subjects of exterritorial regulation. *See* 18 U.S.C. § 1961(1); Pub. L. 91-452, 84 Stat. 922, 923 (describing the principal purpose of RICO as "the eradication of organized crime *in the United States*") (emphasis added). The international comity concerns present whenever criminal laws are given extraterritorial effect are heightened because RICO imposes especially "severe criminal penalties . . . on those engaged in conduct within the Act's compass." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 411-12 (2003) (Ginsburg, J., concurring) (citing 18 U.S.C. § 1963(a) (up to 20 years' imprisonment and wide-ranging forfeiture for a single criminal violation). Finally, the "drastic remedies" available to civil RICO plaintiffs, *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 233 (1989) – which include structural injunctions to reconstitute enterprises and divest defendants of their interests therein, treble damages, and attorneys' fees, 18 U.S.C. § 1964(a) & (c) – are precisely the kind that this Court recognized in *Empagran* as likely to affront foreign sovereigns. Intent to apply such draconian criminal and civil penalties to the foreign conduct of foreign actors cannot reasonably be imputed to Congress.

The court of appeals never addressed these concerns because of its misconception of this Court's extraterritoriality precedents. Pet. 11-17. The court improperly assumed that the presumption against extraterritoriality is not implicated if the alleged foreign conduct has substantial domestic effects. Pet. App. 58a. To the contrary, while such effects may be a legitimate basis for extraterritorial jurisdiction, the presumption remains that such jurisdiction is not intended unless Congress expressly authorizes it.

The D.C. Circuit's error is grievous and in conflict with the precedents of this Court and other courts of appeals. Pet. 17-28. At a minimum, however, the substantial international comity concerns raised by the application of RICO to foreign conduct justify this Court's review of the ruling below.

II. Extraterritorial Application of RICO Will Unduly Burden Multinational Companies and Federal Courts with Foreign Civil Litigation.

Infringement of foreign sovereign interests is not the only evil that follows from the decision below. Giving extraterritorial effect to a statute with the unparalleled breadth and civil remedies of RICO will invite wholly foreign litigation into the United States that does not belong here, and will unduly burden both multinational businesses and the federal courts.

Even within its proper domestic sphere, RICO has been interpreted to extend dramatically beyond its original purpose of fighting organized crime. *Sedima, S.P.R.C. v. Imrex Co.*, 473 U.S. 479, 500 (1985). Judges rue the expansive reach of RICO, which

provides "many ordinary civil cases with an entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 Vill. L. Rev. 853, 857 (1990). *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread."); William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 13 (1989) (advocating "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court."); Samuel A. Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket*, 12-13 (Nat'l Legal Ctr. for the Pub. Interest 1989).[4] The expansive construction of civil RICO "quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions." *Sedima*, 473 U.S. at 501-22 (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting).

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[4] *See also* David B. Sentelle, *Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers*, 12 Campbell L. Rev. 145, 148 (1990) ("every single district judge with whom I have discussed the subject (and I'm talking in the dozens of district judges from across the country) echoes the entreaty expressed in the Chief Justice's title in *The Wall Street Journal*," [Get RICO Cases Out of My Courtroom, May 19, 1989, p. A14, col. 4]"). Scholars echo these concerns. *See* Neil Feldman, *Spiraling Out of Control: Ramifications of Reading RICO Broadly*, 65 Def. Couns. J. 116 (1998) (outlining problems with overly broad RICO application); Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. Rev. 33, 56-57 (1996) (criticizing civil RICO's breadth); Blair Silver, *Controlling Patent Trolling With Civil RICO*, 11 Yale J.L. & Tech. 70 (2009).

Indeed, even by the mid-1980s, the American Bar Association recognized an "epidemic" in civil RICO claims which abused the legal system, distorted legitimate claims, stretched the law beyond its intended limits, and "spawned a new somewhat confusing body of jurisprudence." Arthur F. Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 Notre Dame L. Rev. 896, 898 (1990) (citing Arthur F. Mathews, *et al.*, *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* (1985)). Civil RICO litigation has exploded because lawyers may invoke RICO under a broad range of circumstances, leading to fact-intensive hearings and trials-within-trials. *See* Abrams, *supra*, 50 SMU L. Rev. at 63-75.

The same malleability of RICO will allow foreign plaintiffs to convert many foreign-law disputes into federal claims (for example, by finding some use of U.S. mails or communications networks to support mail or wire fraud allegations). Allowing foreign litigants to bring what are otherwise ordinary foreign civil disputes into U.S. federal courts will only increase the burden on those courts, impose higher litigation costs on defendants, and force defendants into coercive settlements. Even before the D.C. Circuit's ruling, foreign plaintiffs began bringing civil RICO claims based on conduct occurring entirely outside the territorial borders of the United States. Typically, foreign plaintiffs invoke RICO by asserting claims against foreign and domestic companies for conduct (1) consistent with ordinary business disputes and (2) occurring entirely outside the United

States. *See, e.g., Jose*, 801 F. Supp. 349 (foreign plaintiffs bringing RICO claim against foreign corporation for employment-related issues); *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1048 (2d Cir. 1996) (civil RICO claim alleged in a "dispute among groups of foreign companies and foreign nationals, arising out of the 1989 sale and reorganization of a French bank"); *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133 (9th Cir. 2001) (foreign corporation brought RICO claim against corporation regarding joint venture entered into with Chinese government); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003) (civil RICO claim arising from murder by Colombian nationals of trade union leader). If the presumption against extraterritoriality is not applied to RICO claims, these foreign controversies are merely a prelude to the numerous disputes that federal courts will find themselves adjudicating in the future.

The incentives for foreign litigants to refashion foreign law claims as civil RICO claims are many. First, civil RICO gives foreign litigants extraordinary settlement leverage; "[t]he mere threat of a private RICO suit produces settlements because of the risk of treble damages, attorney's fees, expensive discovery, and the public label 'racketeer.'" Arthur F. Mathews, *Legislative Reform of Civil RICO: The Business Community's Perspective, in* Philip A. Lacovara, Jay Kelly Wright & Geoffrey F. Aronow, *Law & Business, Inc., Civil RICO Litigation* 240-41 (1985); *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 155 (2d Cir. 2005) ("recogniz[ing] that the possibility of a RICO treble damages award might have made the choice of a United States forum attractive" to the

plaintiff); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) ("extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"). Second, civil RICO may enable foreign litigants to take advantage of favorable American procedures typically unavailable in foreign courts (such as liberal discovery, class actions, contingent fees, and jury trials). *See, e.g.*, Friedrich K. Juenger, *The Internationalization of Law and Legal Practice: Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553, 561 (1989) (explaining how "exorbitant" jurisdictional practices in the United States provide an incentive to forum shop); *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (*en banc*) (noting that when foreign plaintiff chooses a United States forum, "a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries"). Such favorable remedies and procedures would apply not only to the civil RICO claims, but also to foreign law claims over which the district court may exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367.

Finally, giving extraterritorial application to a statute of RICO's breadth will enable litigants to circumvent the carefully crafted limitations in other federal statutes authorizing recovery for harms caused by foreign conduct. For example, Congress has authorized relief for plaintiffs injured by certain types of foreign conduct under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, but most courts have limited recovery to violations of international law by

state actors (or private actors engaged in genocide or war crimes). *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) ("Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (customary international law "does not reach private, non-state conduct"); *see also Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (holding that the ATS applies to certain categories of action associated with civil strife, including genocide). Claims that would have marginal settlement value as ATS claims result in substantially greater leverage against defendants when recast as civil RICO claims.

The presumption that "United States law governs domestically but does not rule the world," *Microsoft*, 550 U.S. at 454, should apply to RICO. The inevitable result of permitting extraterritorial application of RICO is to subject federal courts to disputes that have no material connection with the United States. Therefore, the Court should grant the petition to prevent already overtaxed federal courts from being further burdened by foreign controversies.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
Petitioner,

v.

UNITED STATES OF AMERICA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors with expertise in legislative jurisdiction and international law, who have an interest in the proper understanding of the presumption against extraterritoriality and the effects test. The D.C. Circuit has advanced an approach to legislative jurisdiction that, in our view, is inconsistent with long-standing principles of American law and is likely to exacerbate already a serious conflict within the lower courts on an unsettled question of law. We submit this brief to clarify the history and application of the effects test and show how that history bears upon the proper interpretation of whether Congress intended a statute to reach extraterritorial conduct. We also submit this brief because, unless corrected, the D.C. Circuit's improper use of the effects test will have far-reaching negative ramifications.

We take no position on the other issues that this case raises. We do not opine as to what Congress intended when it enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO") or wheth-

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[1] No counsel for a party authored this brief in whole or in part. No one, other than *amici* or the institution where they teach, has made a monetary contribution to the preparation and submission of this brief. Pursuant to S. Ct. Rule 37.2, *amici* gave notice of intent to file this brief to counsel of record for all parties at least ten days prior to the date of filing. Letters of consent to the filing of this brief have been lodged with the Clerk.

er that statute applies to the defendant's activities. Nor do we take a position on the underlying merits: the federal government's use of civil RICO to prevent and restrain an alleged scheme to deceive American consumers about the health risks of smoking. If the D.C. Circuit's decision was, or could be, limited to the RICO context, *amici* would not have filed this brief. But the decision is not so constrained. Because the effects test potentially captures all kinds of foreign activity, the D.C. Circuit's decision casts a pall of uncertainty over a wide range of cases involving all types of legislation.

Amici include Professor **Jeffery C. Atik**, Loyola Law School – Los Angeles; Professor **Andrea K. Bjorklund**, University of California, Davis, School of Law; Visiting Associate Professor **Gregory W. Bowman**, West Virginia University College of Law; Associate Professor **Karen Bravo**, Indiana University School of Law – Indianapolis; Professor **Lea Brilmayer**, Yale Law School; Assistant Professor **Anthony J. Colangelo**, Southern Methodist University – Dedman School of Law; Associate Professor **Paul R. Dubinsky**, Wayne State University School of Law; Professor **Mark Gibney**, University of North Carolina – Asheville; Professor **Stuart P. Green**, Rutgers University School of Law – Newark; Associate Professor **Max Huffman**, Indiana University School of Law – Indianapolis; Associate Professor and Associate Dean **Jennifer A. Kreder**, Northern Kentucky University – Chase College of Law; Professor **Robert E. Lutz**, Southwestern Law School; Associate Professor **Jeffrey A. Meyer**, Quinnipiac University School of Law; Associate

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STATEMENT AND SUMMARY OF ARGUMENT

This case raises important and recurring issues implicating legislative jurisdiction and international law. The D.C. Circuit below failed to tackle the difficult question of whether Congress intended RICO to apply to the foreign conduct of non-nationals — an issue on which the lower courts are divided. Instead, it embraced a troubling approach that treats regulation of foreign conduct as domestic, *not* extraterritorial, regulation. The Court should grant review for at least four reasons.

First, the D.C. Circuit's opinion has added confusion to an existing three-way circuit split on the scope and application of the effects test. Some courts interpret the effects test as setting the outer limit of Congress's legislative jurisdiction. *See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (en banc). Others use the effects test as a canon of construction that overrides the presumption against extraterritoriality. *See, e.g., Environmental Defense Fund, Inc. v.*

Massey, 986 F.2d 528 (D.C. Cir. 1993). A third group of courts invokes the effects test and then applies an interest-balancing or comity analysis to decide whether to decline jurisdiction that has otherwise vested. *See, e.g., United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997). Within those three approaches, the case law also tends to reflect confusion as to what constitutes an "effect" and the magnitude and character of the effect required. These pre-existing splits would alone justify granting review.

But the court below went further and outstripped its own decision in *Massey*, a case that embraced the most far reaching of the approaches. The new D.C. Circuit rule is that once the effects test is met, Congressional intent can be presumed. Without looking at RICO's text, its purpose, or even its legislative history, the court concluded that Congress intended to regulate the foreign conduct of foreign corporations. The D.C. Circuit thus fashioned a new analysis in which the effects test serves as a substitute for, and affirmative evidence of, legislative intent. This never-before-recognized analysis makes this Court's review especially warranted.

Second, the meaning of the presumption against extraterritoriality is now in doubt. The court below construed the presumption too narrowly. It did so by designating a new category of statutes with "true extraterritorial reach" and found that the presumption against extraterritoriality applies in only those *true* cases. Pet. App. 58a. The court of appeals opined that an assertion of jurisdiction is not extraterritorial unless a statute is in-

terpreted to "reach foreign conduct with no impact on the United States." *Id.* That newly-minted method for determining whether Congress intended a law to apply to foreign persons and activities is so dramatic a departure from this Court's precedent that the departure alone also justifies granting the petition.

Third, the Court should grant *certiorari* because the D.C. Circuit's decision threatens harm to the work of both Congress and the Executive branch. Congress is affected because the presumption against extraterritoriality is a key interpretive rule that provides the backdrop against which Congress legislates. The Executive branch is affected because the extraterritorial application of law interferes with the creation of comprehensive and harmonized international regulation through state-to-state negotiation.

Lastly, this case presents an ideal vehicle for considering these important issues. Even though the effects test has been utilized since the 1940s and extraterritorial cases are increasingly common, the Court has never directly addressed the test's scope and meaning. In the past, when the Court has declined to act, circuit court decisions on the effects test have been afforded unusual weight and have taken on atypical significance. *See, e.g., Massey*, 986 F.2d at 528; *cf. United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). The Court should grant review and bring much-needed clarity to what has become a confused area of law.

ARGUMENT

The Court should grant *certiorari* to address the three-way split on the effects test's application and to affirm the vitality of the presumption against extraterritoriality. Resolving this case on the merits will avert serious harm and restore predictability to a confused area of law.

I. Conflict And Confusion Exist In The Lower Courts On The Effects Test's Application And Its Interplay With The Presumption Against Extraterritoriality.

This Court should grant review to resolve the deep conflicts that exist in the lower courts. At least three fundamentally different approaches to determining the geographic reach of federal law exist. Within each of these approaches, courts are inconsistent as to the degree and directness of the effect necessary for a statute to reach overseas conduct. If left uncorrected, the decision below will render the meaning of the effects test and the presumption against extraterritoriality even more unsettled.

A. A Three-Way Circuit Split Exists On The Application Of A Doctrine That This Court Has Never Clarified.

Courts do not agree on the proper role, meaning, or application of the effects test and whether that test overrides the presumption against extraterritoriality. Although since 1945 the effects test has dominated the extraterritoriality analysis in antitrust, securities and trademark law contexts, this Court rarely has had the opportunity to offer

guidance about its meaning.[2] The lower courts in turn have developed a patchwork of incoherent and haphazard approaches.

A three-way split prevails in the circuits on how to determine the geographic reach of federal law. The Second Circuit holds that the effects test defines the outer limit of Congress's legislative jurisdiction, leaving the question of the law's reach to a separate inquiry into Congress's intent (subject to the presumption against extraterritoriality). *See Consol. Gold Fields PLC v. Minorco S.A.*, 871 F.2d 252, 261–62 (2d Cir. 1989) (pursuing overseas conduct on the basis of "substantial effects" is an extraterritorial application of U.S. law). Courts applying the Second Circuit's approach understand extraterritoriality to be defined by the situs of the conduct rather than its effects. Although Congress may regulate foreign conduct when effects are felt in the United States, Congress must affirmatively intend to do so. *Id.; see also Steele v. Bulova Watch Co.*, 344 U.S. 280, 285–87 (1952) (finding jurisdiction based on an analysis of Congress's intent).

The First, Third, Fifth, and Seventh Circuits have included foreign comity concerns as part of the effects test in a so-called interest-balancing ap-

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[2] For the rare exception, where the test was applied but not discussed in depth, see *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 704-05 (1962) (finding the antitrust laws to apply where there were substantial effects on commerce within the United States). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (analyzing the extraterritorial reach of the Sherman Act, but not deciding the effects test's scope).

proach. *See Nippon Paper*, 109 F.3d at 8–9; *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982); *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980). Among those circuits that graft a comity analysis onto the effects test, the courts differ on how the analysis is procedurally applied. While some circuits treat comity as one factor in determining a court's jurisdiction, the Third and Seventh Circuits treat comity as a standing inquiry. *See generally* Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 297–304 (2007) (detailing the "refinement of the 'effects test'" in antitrust law and the confusion in the lower courts).

The D.C. Circuit has taken a third approach. This third approach to legislative jurisdiction finds the effects test overrides the presumption against extraterritoriality. In *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984), the D.C. Circuit held that an assertion of jurisdiction over conduct with domestic effects "is not an extraterritorial assertion of jurisdiction." *Id.* at 923. A decade later, in *Massey*, the D.C. Circuit reached the same conclusion. *Massey*, 986 F.2d at 531. In *Massey*, the court held that the presumption against extraterritoriality does not apply when foreign conduct "results in adverse effects within the United States." *Id.*

The split among the lower courts is entrenched and well known. Legal scholars have long lamented the doctrinal incoherence. *See, e.g.*, William Dodge, *Understanding the Presumption Against*

Extraterritoriality, 16 BERKELEY J. INT'L L. 85, 88 (1998) (describing alternative approaches and noting conflicts between circuits); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 638 (4th ed. 2007) (describing the "confusion for private parties and lower courts" based on the courts' different approaches to legislative jurisdiction); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law* (forthcoming 2010), *available at* ssrn.com/abstract_id=1569643, at 4–8 (describing three different approaches to "how U.S. courts should construe geoambiguous laws"). The incoherence creates incentives for forum shopping and causes unpredictable results. The resulting disarray makes it impossible for any entity operating multi-nationally to estimate litigation risk.

As testament to the confusion, one circuit — the Ninth — has wavered among all three alternatives. At times, the Ninth Circuit adheres to the presumption against extraterritoriality. *See, e.g.*, *Subafilms*, 24 F.3d at 1097 (en banc) (finding the presumption against extraterritorial regulation applies even when adverse effects are felt in the U.S.). But three-judge panels of the Ninth Circuit have also toyed with the other two approaches. *Compare Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (applying the interest-balancing approach) *with Pakootas v. Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1075 (9th Cir. 2006) (finding domestic effects in the context of the Superfund laws defeated the presumption against extraterritoriality).

Even Congress has acknowledged the confusion and circuit split. In 1982, Congress addressed the effects test when it enacted the Foreign Trade Antitrust Improvements Act. 15 U.S.C. § 6a. In the legislative history of that antitrust legislation, Congress decried the differences among lower courts "in their expression[s] of the proper test for determining whether U.S. antitrust jurisdiction over international transactions exists." H.R. Rep. No. 97–686, at 2–5 (describing six different versions of the effects test).[3] No analogous legislation exists in other contexts where the effects test is applied. So courts are tasked with determining the extraterritorial reach of federal laws on the basis of a common law scheme that this Court has rarely examined and Congress has not clarified.

B. The Effects Test's Meaning Remains Unsettled.

Not only does conflict exist as to the effects test's relationship to the presumption against extraterritoriality, but also confusion exists as to the degree and directness of effects necessary to permit U.S. law to reach overseas conduct. This confusion provides another compelling reason for granting *certiorari*.

At least three different analyses persist here too. In *Timberlane*, the leading authority for a comity-based approach, the Ninth Circuit stated

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[3] Whether Congress mitigated the problem in antitrust with the FTAIA is unclear. *See* Huffman, *supra*, 44 HOUS. L. REV. at 286 (describing how the FTAIA injected further confusion into the question of antitrust extraterritoriality).

that a "direct and substantial effect" is required. 549 F.2d at 610. That court cited district courts in California, New York and New Jersey as following the same requirement. *Id.* In contrast, the Fifth Circuit has followed a different, disjunctive formulation — "[a] restraint that directly *or* substantially affects" domestic conditions would satisfy the standard for extraterritorial application of the Sherman Act. *Industrial Inv. Dev. Corp.*, 671 F.2d at 883 (emphasis added); *see also Dominicus Americana Bohio v. Gulf & West Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979). Finally, the Second Circuit appears to have replaced "substantial" with "foreseeable," holding that since a domestic effect "was clearly a direct and foreseeable result of the conduct outside the territory of the United States," the district court should have asserted extraterritorial jurisdiction. *Consol. Gold Fields*, 871 F.2d at 262.

In addition to the inconsistent analyses, the test is difficult to apply and lacks doctrinal clarity. Predicting in any given case whether the requisite effects will be found, and their legal significance if they are found, has become impossible. *See* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1480–81, & n.140 (2008) (citing cases); *cf.* Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement,* 60 SMU L. REV. 103, 135–36 (2007) (noting the difficulty of distinguishing between direct and indirect effects). Confusion likewise exists as to whether the effect must be targeted directly against the U.S. government or whether acts that affect private citizens are sufficient. *See* Ellen S. Podgor & Daniel M. Filler, *International Criminal*

Jurisdiction in the Twenty-First Century: Rediscovery United States v. Bowman, 44 SAN DIEGO L. REV. 585, 588–89 (2007) (highlighting an often overlooked, but important, distinction between foreign conduct that "affects private citizens and those acts targeted directly against the government").

II. The D.C. Circuit Dramatically Departed From This Court's Prior Precedent.

More than serious circuit conflicts exist; the D.C. Circuit's ruling also departs from this Court's precedents in two inappropriate ways. First, the court below used the effects test to overcome the presumption against extraterritoriality. Second, the court used the test as a substitute for affirmative evidence of Congressional intent. These errors justify issuing the writ too.

A. The Holding That The Effects Test Nullifies The Presumption Against Extraterritoriality Conflicts With This Court's Precedents.

The D.C. Circuit adopted an approach that creates a gaping exception to the presumption against extraterritoriality. The Court should grant review to restore what once was settled law.

Congress has the power, within Constitutional limits, to enact a statute that regulates the conduct of non-nationals abroad. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). The critical issue is "always one of statutory construction" and whether Congress actually exercised that power. *Stegeman v. United States*, 425 F.2d 984, 986 (9th Cir. 1970) (en banc). Absent unmistakable evidence

to the contrary, the presumption is that Congress does not intend to regulate foreign activity.

This Court has never deviated from this basic tenet of statutory construction. It has often invoked the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993). That notion has led the Court to explain that a presumption against extraterritorial regulation exists. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284–85 (1949)). In "case of doubt," this Court has cautioned, lower courts must construe a statute "to be confined in its operation and effect to the territorial limits" of the United States. *N.Y. Cent. R.R. Co. v. Chisholm*, 269 U.S. 29, 32 (1925).

The presumption is not an outdated or forgotten doctrine. In recent years, this Court has said repeatedly that the presumption against extraterritoriality is a powerful one. *See, e.g., Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007) (affirming the presumption and noting that "foreign conduct is generally the domain of foreign law"); *Small v. United States*, 544 U.S. 385, 388–89 (2005) (affirming the presumption); *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (explaining that courts should avoid interpreting a statute to apply extraterritorially absent a clear contrary intent).

Instead of addressing this binding authority, the D.C. Circuit circumvented it by changing the very definition of extraterritoriality. Pet. App. 58a. According to the court of appeals, extraterritorial

jurisdiction is not implicated if the statute seeks to remedy domestic effects. *Id.* ("[R]egulation of foreign conduct meeting this 'effects' test is 'not an extraterritorial assertion of jurisdiction.'"). *Amici* agree with petitioner that this reading is incompatible with the ordinary meaning of the word "extraterritorial," and how both courts and commentators use the term. *See* Pet. 13. But the D.C. Circuit's reading also leads to an especially peculiar result. Treating the regulation of foreign activity as "domestic regulation" whenever an adverse impact is felt in the United States not only eviscerates the presumption against extraterritoriality but create a presumption in favor of universal jurisdiction.

Properly understood, the effects test was never intended as a canon of statutory construction that overcomes the presumption against extraterritoriality. Instead, the test sets the outer boundary of permissible Congressional action under customary international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (explaining that a "state has jurisdiction to prescribe" when foreign conduct "is intended to have substantial effect[s] within its territory"); S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 16 (Sept. 7) (permitting states to exercise legislative jurisdiction based on domestic effects). Absent an alternative basis for jurisdiction, international law prohibits the U.S. from regulating the foreign conduct of non-nationals that has no effect on the United States. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298–305 (6th ed. 2003) (setting out bases of jurisdiction under international law); *cf.* Lea Brilmayer & Charles

Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) (describing the Constitutional limits on Congress's power to enact extraterritorial legislation).

The effects test thus serves an important purpose, but not the one the D.C. Circuit ascribed to it. If a substantial adverse effect in the United States exists, a court need not account for a second canon of statutory construction that is "wholly independent" of the presumption against extraterritoriality. *Aramco*, 499 U.S. at 264. That canon is: "An act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (providing that states normally refrain from prescribing laws that govern activities connected with another state "when the exercise of such jurisdiction is unreasonable."). The "practice of using international law to limit the extraterritorial reach of statutes" is not a new approach, but "firmly established in [this Court's] jurisprudence." *Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting); *see also Empagran*, 542 U.S. at 164 (courts "must assume" that "Congress ordinarily seeks to follow" "principles of customary international law").

Allowing the effects test to reverse the presumption against extraterritoriality — rather than to set the outer limits of Congress's legislative jurisdiction — would lead to a perverse result. A state's exercise of jurisdiction based on effects, ra-

ther than conduct, is highly contentious. *See* BORN, INT'L CIVIL LITIGATION, *supra*, at 648–49 (describing the "considerable friction" and "foreign resistance" in the antitrust context). It has led to diplomatic protests, blocking and claw-back legislation, the withdrawal of foreign investment, and other forms of retaliation. *See generally* Parrish, *supra*, 61 VAND. L. REV. at 1492–93 nn.192–96 (listing authorities); Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 505–06 (1998) (describing foreign responses). Foreign governments file *amicus* briefs because of concerns over courts expansively interpreting the reach of American law.[4] In short, exercising jurisdiction on the basis of effects nearly guarantees the very "clash" that Congress usually seeks to avoid. *Aramco*, 499 U.S. at 259. But if the effects test is applied as the D.C. Circuit commands, foreign interests would never be accounted for. The effects test would render the presumption impotent at the very moment it is needed most.

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[4] *See, e.g.*, Brief for the Republic of France as *Amicus Curiae* in Support of Respondents, *Morrison v. Nat'l Australia Bank*, No. 08-1192; Brief of the Government of Australia as *Amicus Curiae* in Support Defendants-Appellees, *Morrison v. Nat'l Australia Bank*, No. 08-1192; Brief for the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents, *Morrison v. Nat'l Australia Bank*, No. 08-1192; *see also* Huffman, *supra*, 60 SMU L. REV. at 104 n.6.

B. A Background Interpretative Principle May Not Substitute For An Inquiry Into Congressional Intent.

Even if the effects test could render the presumption against extraterritoriality inapplicable, the D.C. Circuit still erred. Any analysis of a statute's reach begins with an inquiry into legislative intent. The D.C. Circuit, however, jettisoned that inquiry by assuming that once an effect is proven, Congress necessarily intended to regulate the foreign conduct. Pet. App. 58a–60a. Using a canon of construction as affirmative evidence of intent is so at odds with this Court's precedents that this error also warrants review.

The decision below rests on the D.C. Circuit's view that it "need not decide" whether RICO applies extraterritorially "because the district court found BATCo liable on the theory that its conduct had substantial domestic effects." Pet. App. 58a. Instead of ascertaining legislative intent, the D.C. Circuit satisfied itself that it "need decide only whether the district court erred in applying the effects test – which asks whether conduct has a substantial, direct, and foreseeable effect within the United States." Pet. App. 59a–60a. The court did not look at the statute's text, the overall statutory scheme, the legislative purpose or history, or any other benchmark for ascertaining what Congress intended. *Id.* The court of appeals assumed that Congress meant RICO to apply abroad once an effect was found.

Contrary to what the decision below held, however, background interpretative principles are nev-

er a substitute for examining the text and purpose of the statute. Presumptions give way in the face of evidence that Congress intended something different. *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 120–21 (2005) (noting presumption is overcome by clear statement); *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (finding the presumption overcome when a contrary intent appeared). Even when a substantial, direct, adverse effect is felt in the United States, Congress is not required to regulate the activity. *See Subafilms*, 24 F.3d at 1097 (holding that the Copyright Act did not apply to foreign conduct even if adverse effects were felt in the United States). Disagreement may exist as to whether intent to regulate extraterritorially must appear as a clear statement in the statute's text, or whether that intent can be inferred from the statute's purpose and legislative history. *See Aramco*, 499 U.S. at 250–51 (discerning intent with reference to similarly-phrased legislation); *Foley Bros.*, 336 U.S. at 286 (examining the overall statutory scheme and legislative history). But until the D.C. Circuit's decision, no authority permitted a court to dispense altogether with discerning legislative intent.

The upshot is the D.C. Circuit's decision will sow further confusion in the lower courts. Following the D.C. Circuit's reasoning, a court may use the effects test not only to create a presumption *in favor of* extraterritoriality, but as *affirmative evidence* of legislative intent. That is a startling proposition that encourages courts to take on an impermissible legislative function. The prestige of the D.C. Circuit and the dearth of authority that has

addressed the effects test in detail guarantees the decision below will breed mischief for years to come. The Court should grant review to restore stability.

C. Congressional Silence in 1970 is not Evidence of Intent to Regulate Extraterritorially.

Review is also warranted because of another fundamental problem underlying the D.C. Circuit's approach. Even if the effects test can be understood today to reverse the presumption against extraterritoriality, no such understanding existed when Congress enacted RICO. *See American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 252 (1992) (noting that Congress is presumptively aware of the backdrop of existing law when it legislates). The failure of the lower court to consider Congress's intent at the time the statute was enacted also justifies review.

At the time RICO was enacted, it would have been stunning to suggest that courts could presume Congress to have regulated foreign conduct whenever that conduct had a domestic effect. In cases contemporaneous with the enactment of RICO, courts were closely reviewing statutory language and history for indicia of Congressional intent to legislate extraterritorially. *See, e.g.*, *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206–08 (2d Cir. 1968) (Securities and Exchange Act). And the debates in the legal academy were over the extent to which international law permitted regulation of foreign conduct. Isaac N.P. Stokes, *Limits Imposed By International Law on Regulation of Extraterritorial Commercial Activity*, 64 AM. SOC'Y INT'L L. PROC.

135, 135–40 (1970). Near that time, other nations asserted that the effects test was inconsistent with international law. *See, e.g.*, Brief for United Kingdom as *Amicus Curiae* Supporting Appellant, *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (1979), *reprinted in* 50 BRIT. Y.B. INT'L L. 352, 354–55 (1979) (arguing "the 'effects' test is inconsistent with international law," particularly in penal matters); *cf.* BORN, INT'L CIVIL LITIGATION, *supra*, at 649 (explaining that "diplomatic protests" to U.S. extraterritorial laws were commonplace in the 1970s and 1980s).

More specifically, no reason exists to believe that Congress assumed a court would read a criminal statute automatically to apply abroad. The United States had "rarely sought to prosecute for crimes committed outside its territorial jurisdiction." Note, *Extraterritorial Jurisdiction — Criminal Law*, 13 HARV. INT'L L.J. 347 (1972); *see also* Note, *Extraterritorial Application of the Antitrust Laws: A Conflict of Law Approach*, 70 YALE L.J. 259, 266–68 (1960) (describing the prohibition against extraterritorial enforcement of penal laws). In 1970, the National Commission on Reform of Federal Criminal Laws reported that "the issue of the extraterritorial application of the federal criminal law is one which does not arise frequently." NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 21 (1971). And when legislation was proposed to obviate the need for courts to ascertain the extraterritorial implications of federal criminal law legislation, jurisdiction over activity having substantial effects in the United States

was notably absent. Criminal Justice Reform Act of 1975, S.1, 94th Cong., 1st Sess. § 204 (1975).

That Congress in the 1970s would not expect courts to presume its legislation applied abroad is not surprising. At the time Congress enacted RICO, courts had "grant[ed] extraterritorial relief under 'market statutes,' like the antitrust and securities laws," but had "consistently den[ied] it under 'non-market statutes." Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598, 601, 639–41 (1990) (explaining how courts have denied extraterritorial application to nonmarket statutes). And RICO was enacted also long before the decisions in *Massey* and *Laker Airways* that purportedly overturned the presumption against extraterritoriality.[5]

III. Serious Harm Can Result If The Circuit Splits And The Confusion That Exists Below Are Not Resolved.

The D.C. Circuit's approach to legislative jurisdiction will have far-reaching consequences if left to stand. The presumption against extraterritoriality

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[5] When Congress intends a statute to apply to foreign conduct it has no difficulty speaking clearly. *See, e.g.*, 18 U.S.C. § 470 (prohibiting the counterfeiting of U.S. securities anywhere "outside the United States"); 18 U.S.C. § 2251 (prohibiting creating visual depiction of child pornography in foreign countries if intended or known to be transmitted to the United States); 21 U.S.C. § 959 (prohibiting manufacture or distribution of controlled substances and stating that "this section is intended to reach acts of manufacture and distribution outside the territorial jurisdiction of the United States").

is important. Courts look to Congress for guidance, rather than extend U.S. law blindly, for a number of pragmatic reasons.

First, the presumption against extraterritoriality serves as a canon of construction that promotes consistency and aids in the proper implementation of legislative purpose. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation,* 67 N.Y.U. L. REV. 921, 921–24, 941–50 (1992) (arguing that presumptions can aid in giving effect to legislative purpose). Congress must "be able to legislative against a background of clear interpretative rules, so that it may know the effect of the language it adopts." *Finley v. United* States, 490 U.S. 545, 556 (1989). In the jurisdictional context, predictability and simplicity are particularly important. *Hertz Corp. v. Friend,* No. 08–1107, 2010 WL 605601, Slip Op. 15–16 (U.S. Feb. 23, 2010).

Second, the presumption "serves to protect against unintended clashes between our laws and those of other nations." *Aramco,* 499 U.S. at 248; *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (noting the "desire to avoid conflict with the laws of other nations"). Applying American laws to foreign conduct or events can be "an interference with the authority of another sovereign, contrary to the comity of nations." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). At the very least, extraterritorial laws are controversial and can lead to the impression that the United States is imposing its values worldwide. *Microsoft,* 550 U.S. at 454 (explaining the presumption that U.S. law "does not rule the world"); *Em-*

pagran, 542 U.S. at 165 (expressing concern over imposing U.S. regulations on other countries).

Other nations are rightly concerned over expansive interpretations of American law because extraterritorial laws are inherently undemocratic. Extraterritorial laws force foreigners abroad to bear the costs of U.S. regulation, even though they have no vote and little formal ability to influence domestic political processes. Parrish, *supra*, 61 VAND. L. REV. at 1484; *see also* Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 305 (1996) (explaining why extraterritorial laws are undemocratic).[6] And the reciprocal concern for U.S. citizens suffering foreign regulation is well understood. *See, e.g.*, *Small*, 544 U.S. at 389 (listing economic and speech crimes).

Third, the presumption embodies judicial deference and reflects separation-of-powers concerns. Because of the sensitive nature of foreign affairs, the presumption allows courts wisely to "leave[] to Congress's informed judgment" the decision whether a law reaches foreign activity. *Microsoft*, 550 U.S. at 442. An argument that a statute should be given an expansive foreign reach must "be directed to the Congress rather than to [the Court]," because

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[6] In a democracy, those whose conduct is to be controlled by a particular law must have some voice in determining the law's substance. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed.").

it is Congress that "'alone has the facilities necessary to make . . . important policy decision[s]'" that could affect foreign relations. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963) (quoting *Benz v. Compania Naviera Hildago*, 353 U.S. 138, 147 (1957)); *see also Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (the "Judiciary has neither aptitude, facilities nor responsibility" for decisions of this nature). When the Court enters the thicket of international relations — without clear direction from Congress — it runs the risk of unnecessarily upsetting foreign affairs.

The presumption also reflects deference to the Executive branch, providing the Executive the space to negotiate bilateral or multilateral treaties to address activity that has transboundary impact. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2005) (noting in the Alien Tort Statute context the need to be "particularly wary of impinging on the discretion of the Legislative and Executive branches"). Using the effects test broadly to sanction extraterritorial jurisdiction can undermine the implementation of harmonized international regulation. *See* RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 6 (1964) (excessive extraterritorial jurisdiction "invites retaliation, engenders distrust, and undermines those actual and potential claims of international law to make stable the relations among the entire community of states.").[7] It is no answer to

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[7] Although some scholars have suggested that extraterritorial regulation can provoke international agreement by creating

suggest that the Justice Department accommodated that concern in bringing this suit against petitioner. The impacts of the decision below reach far beyond the litigation in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted.

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international discord, the theory has not played out in practice. *See* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 871-72 (2009). As one example, while the United States began applying its antitrust laws extraterritorially in the 1940s, cooperation in the form of a multilateral competition treaty is still out of reach. *See* Andrew T. Guzman, *Is International Antitrust Impossible?*, 73 N.Y.U. L. REV. 1501, 1504 (1998) (describing the difficulty in reaching international agreement).

(9)

No. 09-980

JUL 23 2010

IN THE

Supreme Court of the United States

BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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PETITION FOR REHEARING

Petitioner British American Tobacco (Investments) Limited ("BATCo") respectfully requests rehearing of the Court's order dated June 28, 2010, denying the petition for a writ of certiorari in this case. It is unusual for this Court to grant rehearing and grant plenary review, but it is far more common for this Court to grant rehearing and then grant certiorari, vacate the judgment below, and remand (a "GVR order") for consideration of an intervening decision of this Court. *E.g.*, *Melson* v. *Allen*, No. 09-5373 (June 21, 2010); *Hawkins* v. *United States*, 543 U.S. 1097 (2005); *Lauersen* v. *United States*, 543 U.S. 1097 (2005). See generally E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 15.1, at 807 n.5, § 15.6(b) at 819 (9th ed. 2007) (citing additional cases). That would be the appropriate disposition in this case.

On June 24, 2010, the same day the petition was conferenced, this Court issued its opinion in *Morrison* v. *National Australia Bank Ltd.*, No. 08-1191. As explained below, *Morrison* thoroughly invalidates the reasoning on which the D.C. Circuit based its holding in this case – namely, that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (RICO), reaches BATCo's conduct outside the United States under the so-called "effects" test. Accordingly, the Court should grant rehearing, vacate the order denying certiorari, and enter a GVR order so that the D.C. Circuit may consider *Morrison*'s impact in the first instance.

A. BATCo's certiorari petition presented the following questions:

1. Whether the D.C. Circuit correctly held * * * that the traditional presumption against extraterritoriality is completely irrelevant to determining whether Congress intends a statute to reach the wholly foreign conduct of a foreign corporation, if such foreign conduct is alleged to have had a direct and substantial effect within the United States.

2. Whether the D.C. Circuit, in concluding that * * * RICO[] regulates petitioner's wholly foreign conduct, improperly (a) ignored the presumption against extraterritoriality and affirmative evidence that Congress never intended RICO to apply extraterritorially; (b) borrowed from federal securities and antitrust cases the ill-suited "effects" test as a measure of RICO's extraterritorial reach; (c) approved a watered-down version of that test that conflicts with the test used by other circuits; and (d) relied on the U.S. "effects" of the U.S. conduct of *other co-defendants* and of the "overall" alleged RICO scheme.

Pet. i. As the petition explained (at 11-17, 32-33), the D.C. Circuit's decision created a flawed "exception" to the traditional presumption against extraterritoriality for cases where the "effects" test is satisfied. The D.C. Circuit held that RICO could properly be applied to BATCo's foreign conduct based on that novel theory, and on its twin conclusions that the "effects" test could be properly transplanted from securities and antitrust law to RICO and that a severely watered-down version of the "effects" test was satisfied here.

B. In *Morrison*, this Court addressed the extraterritorial reach of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). At the outset, the Court examined the genesis of both the "conduct" and the "effects" tests as supposed measures of Section 10(b)'s extraterritorial reach. Slip op. 5-11. The Court held that both tests were legally invalid for two independent reasons.

First, the Court condemned both tests as "judicial-speculation-made-law" that impermissibly "excised," "ignored," or "disregard[ed] the presumption against extraterritoriality." Slip op. 6, 8, 12, 24. When a statute is silent about extraterritorial reach, the Court explained, judges have no business "divining what Congress would have wanted." *Id.* at 6. "Rather than guess anew in each case," the Court explained, "we apply the presumption *in all cases*, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 12 (emphasis added). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 6. Accordingly, the Court rejected the "effects" and "conduct" tests as illegitimate end runs around the presumption against extraterritoriality, which applies "in all cases." *Id.* at 11-12.

Second, the Court condemned the "effects" and "conduct" tests as "vague," "not easy to administer," and wholly "unpredictable." Slip op. 6, 9. "There is no more damning indictment of the 'conduct' and 'effects' tests," the Court explained, "than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases * * * is not necessarily

dispositive in future cases.'" *Id.* at 9 (quoting *IIT* v. *Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980)).

C. This Court's "broad power to GVR" (*Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam)) is derived from 28 U.S.C. § 2106, which authorizes this Court to "vacate * * * any judgment," "remand the cause," and "require such further proceedings * * * as may be just under the circumstances." A GVR order is appropriate "[w]here [(i)] intervening developments * * * reveal a *reasonable probability* that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and [(ii)] * * * it appears that such a redetermination may determine the ultimate outcome of the litigation." *Chater*, 516 U.S. at 167 (emphasis added).[1] Both parts of that standard are easily satisfied here.

(i) *There is more than a "reasonable probability" that the decision below rests on a premise that the lower court would reject in light of* Morrison. The D.C. Circuit's decision rested on several related premises, each of which was invalidated by *Morrison*. First and most obviously, the D.C. Circuit, like the district court, concluded that the "effects" test was properly borrowed from securities and antitrust law and applied to RICO as a measure of RICO's reach. Pet. 1 n.2; App. 57a-60a, 1931a-1933a. This Court in

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[1] Even those Justices who have objected to certain GVRs have acknowledged that such relief is appropriate "where an intervening factor has arisen [such as new legislation or a recent decision of this Court] that has a legal bearing on the decision '" *Webster* v. *Cooper*, 130 S Ct. 456, 456 (2009) (Scalia, J., dissenting) (citation omitted). See generally E. GRESSMAN ET AL., *supra*, § 5 12(b), at 345-49

Morrison, however, rejected the "effects" test as both fundamentally inconsistent with the presumption against extraterritoriality *and* hopelessly vague and indeterminate in application.

Second, the D.C. Circuit's decision rested squarely on the premise that the traditional presumption against extraterritoriality "does not apply" if the "effects" test can be satisfied. App. 58a. In *Morrison*, however, this Court held that courts must "apply the presumption *in all cases*," thereby "preserving a stable background against which Congress can legislate with predictable effects." Slip op. 12 (emphasis added). The D.C. Circuit's use of the "effects" test to avoid the presumption against extraterritoriality is *precisely* what this Court disapproved in *Morrison*. After *Morrison*, the presumption must be applied "in all cases" and is not subject to exceptions – least of all an exception defined by the vague and illegitimate "effects" test, which swallows the presumption whole.

For the same reasons, the D.C. Circuit's novel definition of "true extraterritorial reach" (App. 58a) does not survive *Morrison*. According to the D.C. Circuit, "Congress's regulation of foreign conduct meeting th[e] 'effects' test is *not* an *extraterritorial* assertion of jurisdiction" *at all*. App. 58a (internal quotation marks omitted). But that merely accomplishes through a stilted and erroneous definition of "extraterritorial" the same impermissible result (and end run around the presumption) rejected in *Morrison*. And it is far worse than what happened in *Morrison*, because the D.C. Circuit's novel definition applies *across the board* to *every* federal statute (and thus has no connection, presumed or otherwise,

to what Congress actually intended). If the D.C. Circuit were correct about when a statute has "true extraterritorial reach," then *Morrison* necessarily would have come out the other way.[2]

Not only does *Morrison* invalidate the rationales underlying the D.C. Circuit's extraterritoriality decision, but it also repudiates the legal authorities on which the lower courts relied. See *Lords Landing Village Condo. Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam) (entering GVR order where an intervening judicial decision included "explicit disapproval of the cases on which the Court of Appeals based its decision"). In explaining that the "effects" test "asks whether conduct has a substantial, direct, and foreseeable effect within the United States" (App. 59a), the D.C. Circuit relied on *Consol. Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989), which discussed and applied the "effects" test as developed in the securities context by a line of Second Circuit cases (including *Schoenbaum* and *Leasco*) that has now been explicitly repudiated by *Morrison*. See slip op. 6-8. The district court likewise relied on *Minorco* and other securities cases involving the "effects" test. See App. 1932a; see also *United States* v. *Philip Morris USA, Inc.*, 477 F. Supp. 2d 191, 197 (D.D.C.

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[2] In any event, the D.C. Circuit's novel definition of "extraterritorial" is inconsistent with this Court's definition in *Morrison*, which focused on "whether a statute applie[d] abroad" (whether or not the foreign conduct it reached caused domestic effects). Slip op. 16; see also *id.* at 15 ("[I]t would be odd for Congress to indicate the *extraterritorial application* of the whole Exchange Act by means of a provision imposing a condition precedent to its *application abroad*.") (emphasis added).

2007) (indicating that court would be "guided by the two alternative tests used [in] * * * anti-trust and securities fraud cases").

Finally, at least in the view of two concurring Justices in *Morrison*, the Court's decision represents the adoption of a more stringent version of the presumption against extraterritoriality. See slip op. 6 (Stevens, J., joined by Ginsburg, J., concurring in the judgment) (suggesting that Court's opinion "seeks to transform the presumption from a flexible rule of thumb into something more like a clear statement rule"). Under that view, *Morrison* changes the law with respect to the presumption, which further increases the likelihood of a different outcome following this Court's remand. Tellingly, the concurring Justices cited *Environmental Defense Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993), as an example of the more "flexible" approach to the presumption that they favored but that the majority rejected in *Morrison*. In the decision below, the D.C. Circuit cited *Massey* as the source for its holding that, "when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply." App. 58a.

For all of these reasons, in light of *Morrison*, there is a virtual certainty – far more than merely the requisite "reasonable probability" – that the D.C. Circuit would reject the premises underlying its decision to use the "effects" test (a) to measure RICO's extraterritorial reach, and more generally (b) to disregard the presumption against extraterritorial application of U.S. laws.

(ii) *A redetermination of the extraterritoriality issue following a GVR "may determine the ultimate*

outcome" of the litigation against BATCo. As explained in the petition (at 15-17, 23-27, 32-35), the D.C. Circuit's use of the "effects" test to measure RICO's extraterritorial reach (and its recognition of a novel exception to the presumption against extraterritoriality where the "effects" test is satisfied) were dispositive to the outcome of the government's case against BATCo. The D.C. Circuit provided no alternative grounds for affirmance. If, as explained above, *Morrison* means that the D.C. Circuit, on remand, would conclude that it must apply the presumption "in all cases" and would reject the "effects" test as a measure of RICO's extraterritorial reach, then the court of appeals would also necessarily conclude that RICO has no extraterritorial reach at all. As noted in the petition (at 15), the United States has never disputed the district court's conclusion that RICO is at best "silent as to its extraterritorial application." 477 F. Supp. 2d at 197 (citation and internal quotation marks omitted). Under *Morrison*, that silence is dispositive. See slip op. 6 ("When a statute gives no clear indication of an extraterritorial application, it has none.").

Here, of course, there is even more than mere silence. There is substantial evidence in RICO's text, structure, and legislative history suggesting that Congress did *not* intend RICO to extend beyond the Nation's borders. See Pet. 16-17, 19, 29-30 & nn.6-7 (discussing service-of-process provision, Congress's declaration of its exclusively domestic purpose, and other evidence); Reply Br. 10. This evidence, which neither the government nor the D.C. Circuit has ever addressed, would also require the D.C. Circuit on

remand to reverse its holding concerning RICO's worldwide reach.

Finally, although the government tellingly devoted most of its brief in opposition to advancing several alternative grounds for affirmance, BATCo has demonstrated that those arguments were not preserved in the lower courts and are in any event meritless. Reply Br. 1-7. Even if they were preserved (and they were not). these arguments are of no help to the government. Unless it can overcome the strong presumption against extraterritoriality recognized in *Morrison*, which it cannot, the government cannot prevail in its arguments that RICO has a global reach *whether or not* any substantial and direct U.S. effects are felt so long as the RICO plaintiff alleges a conspiracy, invokes the presence of *some* U.S. contacts, or includes wire fraud as part of the RICO claim.[3]

D. This Court has frequently granted rehearing of an order denying a petition for certiorari based on the intervening circumstance of a new and controlling

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[3] *Morrison* itself reaffirmed that domestic conduct must be the "'focus' of congressional concern" (slip op. 17) for it to render an otherwise extraterritorial application of a U.S. statute domestic in nature. Indeed, the Court in *Morrison* recognized that "[i]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Ibid* (emphasis in original). At a minimum, therefore, the D.C. Circuit should be allowed to address the purported alternative arguments predicated on BATCo's U.S. contacts – and BATCo's responses to them and *Morrison*'s teachings – in the first instance.

Supreme Court decision. See page 1, *supra*. In *Chater*, the Court explained the systemic virtues of its standard practice of entering a GVR order where, as here, an intervening decision of this Court has cast serious doubt on a court of appeals' decision:

> In an appropriate case, a GVR order * * * alleviates the "[p]otential for unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues, see *United States* v. *Johnson*, 457 U.S. 537, 555, n. 16 (1982); cf. *Griffith* v. *Kentucky*, 479 U.S. 314, 323 (1987) ("[W]e fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final").

516 U.S. at 167. The Court's standard GVR practice ensures that litigants obtain the benefit of changes in the law that occur after a decision by a court of appeals but before a judgment becomes final.

E. In *Chater*, this Court suggested that, even if a GVR order is "potentially appropriate," the Court might elect not to grant such relief if (i) an "intervening development, such as a confession of error * * * is part of an unfair or manipulative litigation strategy," or (ii) "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court." 516 U.S. at 167-68. Neither of these considerations supports withholding a GVR order in this case.

First, there is no issue of unfair or manipulative litigation strategy on BATCo's part. On the contrary, throughout this long litigation, at every level, BATCo has consistently and vigorously maintained that RICO has *no* extraterritorial reach and thus may not

be applied to BATCo based on its foreign conduct. BATCo has done everything it could to preserve its legal position on this issue. See also Pet. 28 n.11 (noting connection between pending decision in *Morrison* and this case). It would be manifestly *inequitable* to deny BATCo the full benefit of a decision of this Court, issued the very day that this case was conferenced, that makes it clear that the decision below was incorrect. See *Johnson*, 457 U.S. at 555 n.16 ("[I]nequity * * * results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retroactively applied rule.") (emphasis omitted).

Nor is there any plausible argument that the Court should withhold a GVR order here because the resulting costs and delays outweigh the potential benefits. The potential benefits are significant: the strong likelihood that the D.C. Circuit would correct its own serious error, conform its decision concerning RICO's extraterritorial reach to *Morrison*, restore the presumption against extraterritoriality to its proper function in the D.C. Circuit, and confine RICO to its proper domestic limits. Moreover, a GVR order would expedite rather than delay the remand proceedings. It would allow the D.C. Circuit to address *Morrison*'s impact in the first instance, rather than relegate that issue to the district court, which has already been directed on remand to "reformulate" its injunction on the use of low-tar descriptors outside the United States "to exempt foreign activities that have no substantial, direct and foreseeable domestic effects" (App. 74a-75a). A GVR order could avoid the need for another time-consuming round of trial (and appellate) litigation over the binding effect of the D.C. Circuit's extraterritoriality rulings – as to

BATCo's liability *and* the geographic reach of the district court's injunction banning the use of low-tar descriptors – under the law-of-the-case doctrine.

CONCLUSION

The Court should grant the petition for rehearing, vacate the order denying certiorari, and enter an order that grants the petition for certiorari, vacates the portion of the D.C. Circuit's decision that concerns the extraterritorial reach of RICO, and remands for consideration of *Morrison*.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

As counsel of record for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

Counsel for Petitioner